The Central Law Journal.

ST. LOUIS, MAY 28, 1886.

CURRENT EVENTS.

ADVICE GRATIS.—In the last two numbers of the journal appear communications from correspondents, making suggestions on the subject of tables of cases, to authors and publishers of text books. We are now moved to administer a little advice, *gratis*, not only to that very deserving class of persons who write text-books, but to all others who in any form write for publication on legal subjects. It is this: never cite a case merely by volume and page, but give also the names of the parties. There is too much liability to mistake between the author's first hasty note and the final sterotype impression, to trust any more to chance than is absolutely necessary. The name of the case cited, often affords a remedy if there is a mistake in the number of the volume or page. Without it, and especially when the mistake is in the volume, the error is frequently irremediable, and the reference, however, valuable it may be, goes to the "limbo of things lost on earth." Many excellent books have this capital defect, notably Bouvier's Law Dictionary, in which more than once we have found references that could not be verified. Bouvier certainly is a standard work, and we suppose, "nice customs curtesy to great kings;" nevertheless as we remarked in our last number, apropos of tables of cases, whatever is worth doing at all is worth doing well, and the writer who undertakes to tell his reader where a legal principle is to be found, should tell, as fully as he reasonably can, all that he knows himself.

PASSENGERS' BAGGAGE.—The nomadic propensities of the present generation not only fill the railroad cars and all other vehicles of travel, but furnish a full proportion of questions for judicial consideration. Our attention has been called to a recent Indiana case in which the court defines with precision the liability of a sleeping car company for the personal baggage of its passenger. The rule is laid down that while the passengers is in the car, and awake, his satchel, overcoat and other personal baggage, not checked, is in his own custody and at his risk; but when he is asleep, or absent from the car during a stoppage of the train for meals, the responsibility of the company accrues, and continues during the period of his disability from sleep or absence. The responsibility of the sleeping car company for baggage thus left in charge of of its porter is not that of an insurer, nor of a common carrier, nor of an inn-keeper but simply that of a bailee for hire, and the degree of care required at its hands is reasonable care to prevent thefts.[1] In a Massachusetts case it is held by Gray C. J., that although a railway company is not responsible as a common carrier for articles of personal baggage kept by the passenger exclusively within his own control, it is liable for loss of such an article by the negligence of the corporation or its agents, or servants and without fault of the passenger.[2] And in a Pennsylvania case,[3] the court holds that an ocean steamship company although not liable for baggage in the general custody of the passenger, either as carrier or inn-keeper, is nevertheless responsible for the loss of such baggage by the negligence of its own servants. This matter has recently come into question in England, but in another form and there was some difference in judicial opinions on the subject. A passenger putting his satchel in the hands of a railway porter, thereby charges the company with its custody, and fixes the liability for its loss upon the company. And this was held to be the law, although the porter was required by the passenger to wait until he got his ticket or spoke to his friends, against the opinion of some of the judges who thought that the company was not liable, unless the porter were permitted to make a bee-line to the train.

[1] Woodruff, etc. Co. v. Diehl, 84 Ind. 474, 480; Welch v. Pullman, etc. Co., 17 Abb. (N. S.) 352; Pullman, etc. Co. v. Smith, 73 Ill. 360.

[2] Kinsley v. Lake Shore R. R. Co., 125 Mass. 54; Clark v. Barns, 118 Mass. 275; Bergheim v. Great E. Division, 3 C. P. D. 221.

[3] American, etc. Co. v. Bryan, 83 Pa. St. 446. See Thomp. Carr. Passen., p. 518.

NOTES OF RECENT DECISIONS.

HOMICIDE — SELF-DEFENSE — RETREAT TO THE WALL.—In a recent case in Iowa,[1] the Supreme Court takes what is believed by some gentlemen of the bar in that State, to be a new departure on the law of self-defense, and the duty of a person assailed to "retreat to the wall," before taking human life. In that case the prisoner was pursued by the deceased (who was his father), armed with a pitchfork, very angry, and apparently intent upon serious mischief. Without exhausting his remedy of flight, the prisoner turned upon his pursuer and shot him, and he died two days afterwards. The prisoner was convicted of manslaughter, and sentenced to imprisonment for fifteen years. In the trial court, the judge charged the jury thus: "You are instructed that it is a general rule of law that, where one is assaulted by another, it is the duty of the person thus assaulted to retire to what is termed in the law a wall or ditch, before he is justified, in repelling such assault, in taking the life of his assailant. But cases frequently arise where an assault is made with a dangerous or deadly weapon, and in so fierce a manner as not to allow the person thus assaulted to retire without manifest danger of his life or great bodily injury; in such cases he is not required to retreat." This instruction, the Supreme Court held, stated the law on the subject correctly.

For the defense it was argued that the instruction was erroneous in holding that the assailed is bound to retreat, and is only exempt from the necessity of doing so, where it would be manifestly dangerous to attempt a retreat. It was insisted that the assailed is only bound to retreat where the assault is not felonious. Where it is felonious the assailed may well stand his ground and kill his assailant, if he has reasonable grounds as a prudent man for believing that if he does not, his assailant will kill him. And this, under these circumstances, he may well do, irrespective of his means of escape by flight.

This line of defense the Supreme Court held was untenable, and, as we learn from a correspondent, the opinion of the profession in Iowa is divided on the subject.

[1] State v. Donnelly, 27 N. W. Rep. 369.

If the time-honored doctrine which requires a retreat to the wall is limited to non-felonious assaults, as seems to be argued against the reasoning of the court, there are comparatively very few cases in which retreat can be required at all. The question can seldom arise except in cases which our statutes denominate "assaults to kill." In an ordinary affray or "fisticuff" the assault is not felonious, and in those cases the danger to life or of great bodily harm does not usually exist, and these are as essential to a successful defense, as the retreat to the wall. Mr. Bishop says: "The cases in which this doctrine of retreating to the wall is commonly invoked are those of mutual combat. Both parties being in the wrong, neither can right himself except by retreating to the wall. Where one, contrary to his original expectation, finds himself so hotly pressed as to render the killing of the other necessary to save his own life, he is guilty of felonious homicide if he kills him, unless he first actually puts into exercise this duty of withdrawing from the place." [2]

An assault may not be in the first instance, felonious; but if in the heat of the affray there arises danger to the life of either of the parties, it can hardly be possible that there shall not exist in one or the other, or both of them, a felonious design to kill and murder. And the very law that requires the retreat to the wall, recognizes the existence of such danger and of such design as a condition precedent to the retreat to the wall and its subsequent fatal result. Unless a man engaged in an affray is in danger of his life, or of great bodily harm, he has no right to kill his adversary, either before or after retreating to the wall. And therefore, as it is in all cases necessary, in order to excuse a homicide *after* a retreat to the wall, to show that the prisoner was, or believed he was, in serious danger from his adversary, it follows that that adversary must have been in the act of committing a crime, the equivalent of the statutory assault to kill, which is felonious.

The argument against the ruling of the court is based upon the idea that when one is attempting to commit a felony, it is justifiable

[2] 1 Bish. Cr. Law, § 870; citing Foster, 227; State v. Hill, 4 Dev. & Batt. 491; Stoffer v. State, 15 Ohio St. 47; State v. Howell, 9 Ired. 485.

to prevent it by taking the felon's life, if that is the only mode in which the perpetration of the crime can be prevented. This, it may be observed, is merely arguing in a circle, for if the intended felony of the elder Donnelly could have been prevented by the flight of the younger, the death of the former at the hands of the latter could not be excused even upon this principle. We think that the Supreme Court of Iowa decided this case correctly, for we believe that the true rule is, that to excuse a homicide on the ground of self-defense the party must, if he could with safety, have retreated to the wall, and that the only exception to the rule is, that when a man is assailed in his own house he is under no obligation to retreat at all.[3]

NEGLIGENCE — HIDDEN DEFECT — BROKEN RAIL.—In a case recently tried in the United States Circuit Court for the Eastern District of Missouri, was presented a very interesting phase of the multitudinous and all-pervading subject of negligence. There was a railroad accident; a passenger, guiltless of contributory negligence, was seriously hurt; of course he sued the company (Louisville and Nashville), and equally, of course, the company denied all liability.

The facts were that the derailment of the train on which the plaintiff was a passenger was occasioned by a broken rail which was defective in its interior, and, as the defendant insisted, the defect was of such a character as could not be detected in advance by any inspection or other test which the company could possibly apply to it. The evidence was conflicting as to the defect of the rail. The case was argued by Messrs. Dyer and Frank for the plaintiff, and Mr. Bond for the defendant. The verdict of the jury was for the defendant.

Judge Treat charged the jury that: "A passenger on a railroad train has a right to suppose that all the appliances connected with his transportation are such as the highest degree of human skill and prudence would furnish. If he meets with an injury through the fault of the railroad company, he is entitled to compensation therefor, including all the expenditures by him made in consequence of said injury, together with his loss of time and a proper allowance for any special suffering to which he may have been put, mentally or physically; and also, the jury will take into consideration, whether the injury is permanent or temporary."

The following is Judge Treat's very terse and lucid statement of the duty of a railroad company to its passengers.

"It is the duty of a railroad company to exercise the highest degree of prudence and skill, to determine that everything is safe for transportation. If an accident happens in consequence of a failure to exercise that degree of skill and prudence, the company is responsible for what may happen.

"On the other hand a railroad company, like an individual, can do nothing more than to exercise all the skill and diligence known for the purposes of its employment, and having done so, if there is a latent defect, a concealed defect, which that degree of intelligence, prudence or skill cannot detect, it is not responsible for what may happen. In other words, a railroad company is not an insurer, and while it is not an insurer that the passengers shall be transported with perfect safety, it is bound, on the other hand, to exercise all of the skill and prudence known to the highest order of intelligence connected with such matters.

"If this is done and an accident occurs, it has discharged its duty."

There can be no question that the liability of the carrier in such cases as that under consideration is for negligence, and for nothing else. He is no insurer, and he gives no warranty. He is, however, on the single point on which he is liable at all, held to the strictest responsibility. When human life is concerned, the care required of him is the most exhaustive possible. All his appliances must be the best that the highest degree of human skill and prudence can furnish. If, in spite of this skill and this prudence, a disaster occurs from a latent and concealed defect in any of the appliances used in his business, he is not responsible, unless, indeed, the negligence of the manufacturer by which the de-

[3] On this subject see: People v. Sullivan, 7 N. Y. 396; Mitchell v. State, 22 Ga. 211; Lyon v. State, Ibid, 399; Cotten v. State, 31 Miss. 504; People v. Hurley, 8 Cal. 390; State v. Thompson, 9 Iowa, 108; United States v. Mingo, 2 Curtis, 1.

fect became possible can be imputed to him. That question will be considered later. The leading case on the subject of the liability of carriers for latent defects in their vehicles (or other appliances) is Ingalls v. Bills,[4] which was decided in 1845 when this branch of the law of carriers was very imperfectly developed. The court examined and cited the few antecedent cases.[5] From a full consideration of these cases, the court arrives at the conclusion, that the carrier is liable for injuries resulting from defects which might have been discovered and remedied by most careful and thorough examination; but if the accident result from "a hidden and internal defect, which a careful and thorough examination would not disclose," then the carrier is not liable.

The case just cited,[6] related to stage coaches; ten years later, in a New York case,[7] the court makes a distinction between the rules of law which govern the liability of stage coach proprietors and railroad companies, holding the latter to a much more stringent liability than the former, requiring them to answer for the delinquency of the manufacturer of their rolling stock, etc., but nevertheless excludihg responsibility for defects which could not be discovered in the process of producing the article. A later case in the same State excuses the company from responsibility for the weather, the *vis major* of extreme cold operating to break the rails,[8] but stipulates, nevertheless, that to excuse the company, the disaster must have been such as could not have been avoided by any human foresight. To a like effect is a still later New York case;[9] the ruling in that case bringing into the question the manufacturer of the defective article. The court says: "Carriers of passengers are not insurers, * * * * , nor do they undertake that the vessels or vehicles which they use, or that the machinery they employ, are absolutely free from defects, * * * and when they undertake to carry by the dangerous agency of steam, and injury is occasioned to passengers thereby, they cannot escape liability unless it appears that the accident happened from causes beyond their control, and to which neither the negligence of the carrier, nor of the manufacturer of the machinery, nor of those employed to manage it, contributed."

In an English case,[10] the court lays down very elaborately the law relating to the liability of the carrier, excluding the idea of a warranty, limiting that liability to negligence, and excluding all responsibility for disasters that, by "due care," could not be foreseen or prevented, and including in that class of disasters those arising from latent defects.

In a Tennessee case,[11] it was held that a carrier was bound for injuries resulting from defects which the manufacturer might, with due care and skill, have discovered; but on this point it is expressly overruled by a later case,[12] in which the New York rulings on the subject, especially Hegeman v. Western etc. Co.,[13] are carefully reviewed. The court, with some emphasis, dissents from the conclusions in those cases.

We would like to pursue this subject further, but are admonished that the limited space at our disposal precludes the indulgence of that desire. Finally, we conclude that although carriers of passengers for hire are not insurers, and give no warranty of a safe transit, they are held to the utmost degree of care and prudence, and are required to avail themselves of the best safeguards which human foresight and skill can provide, but they are not responsible for latent defects of machinery or other appliances, the fault of the manufacturer, which could not be discovered by careful, thorough and scientific inspection made by the carriers.[14]

[4] 9 Metcf., I.

[5] Israel v. Clark, 4 Esp. 259; Crofts v. Waterhouse, 3 Bingh. 319; Bremner v. Williams, 1 Carr. & P. 414: Sharp v. Gray, 9 Bing. 457; White v. Boulton, Peake's Cas. 81; Aston v. Heaven, 2 Esp. 533; Christie v. Griggs, 2 Camp. 79; Bretherton v. Wood, 3 Brod. & Bing. 54; Ansell v. Waterhouse, 6 M. & S. 385; Camden, etc. R. R. Co. v. Burke, 13 Wend. 626; Boyce v. Anderson, 2 Pet. 155; Stokes v. Saltonstall, 13 Pet. 181; Hollister v. Nowlen, 19 Wend. 236; Jones v. Boyce, 1 Starkie, 493.

[6] Ingalls v. Bills, 9 Metcf. 1.

[7] Hegeman v. Western R. R. Co., 13 N. Y. 9.

[8] McFadden v. New York, etc. Co., 44 N. Y. 478.

[9] Carroll v. Staten, etc. R. R. Co., 58 N. Y. 126.

[10] Readhead v. Midland, etc. Company, 4 L. R. (4 Q. B.) 379.

[11] N. & C. R. R. Co. v. Elliott, 1 Coldw. 611.

[12] N. & D. R. R. Co. v. Jones, 9 Heisk. 27, 42.

[13] *Supra.*

[14] On this subject, generally, see Grand Rapids, etc. Co. v. Hunt, 38 Mich. 573, 546; The Nederland, 7 Fed. Rep. 877; s. c., 14 Fed. Repr. 63; Meier v. Pennsylvania, etc. Co., 64 Pa. St. 225; Baker v. Alleghany, etc. Co., 95 Pa. St. 211; Sawyer v. Hannibal, etc. Co., 37 Mo. 241; Henry v. St. Louis, etc. Co., 76 Mo. 288; Derwort v. Loomer, 21 Conn. 245.

DECLARATIONS OF PAIN AND SUFFERING.

In the CENTRAL LAW JOURNAL of April 2, 1886, appears the case of Louisville, New Albany & Chicago R. Co. v. Falvey, recently decided by the Supreme Court of Indiana. In a note appended to the case many valuable cases relating to expert evidence are collected, but the note fails to present with any completeness the authorities upon one of the most interesting questions which arose in the Falvey case, and still more recently in the case of Cleveland, etc. R. Co. v. Newell.[1] That question was as to the circumstances and conditions under which declarations and statements of pain and suffering are admissible in evidence in behalf of the declarant. With the increase in the frequency with which physicians are called as witnesses, this question has grown in importance; but although there have been many cases decided in which the admissibility of such declarations has been an issue, the rules governing their admissibility are still among the most unsettled in the law of evidence.

The general rule applicable to such evidence, is thus stated by Mr. Greenleaf:

"Whenever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings, made at the time in question, are also original evidence. If they were the natural language of the affection, whether of body or mind, they furnish satisfactory evidence, and often the only proof of its existence."

"So, also, the representations by a sick person, of the nature, symptoms and effects of the malady, under which he is laboring at the time, are received as original evidence. If made to a medical attendant, they are of greater weight as evidence; but if made to any other person, they are not on that account rejected." [2]

Whether the doctrine is stated with entire accuracy by Mr. Greenleaf may be doubted; but that his meaning has been frequently misunderstood, and the rule misapplied by the courts, an examination of the cases will establish.

In part, at least, the doctrine just stated is clearly an exception to the general rule excluding hearsay and self-serving declarations, and, this being true, the limitations of the exception should not be overlooked, and the admission of "such evidence must not be extended beyond the necessity upon which the rule is founded." [3]

And, generally speaking, declarations or statements, self-serving in character, must have been made under such circumstances "as to free them from the suspicion of having been made with reference to pending or future litigation," or they are inadmissible.[4]

So, also, it is a rule, generally applicable to statements and declarations admitted as an exception to the rule excluding hearsay, that they must have been made *ante litem motam*, that is, before the controversy existed upon the facts.[5]

Whether that rule is always applicable to delarations of pain and suffering will be discussed hereafter.

One important limitation upon, and distinction in, the rule laid down by Mr. Greenleaf, is too often disregarded. There is a marked distinction between spoken declarations or statements describing pain and suffering past or present, and those spontaneous and involuntary movements, exclamations and expressions which indicate the present existence of pain. Declarations descriptive of pain, either past or present, are narratives and not acts, "while exclamations of suffering may be, and if honest, are parts of the occurrence itself." The rule as to the admissibility of the former should be more strict than the one relating to the latter, otherwise it would be easy for a party litigant to manufacture evidence in his own behalf.

Bearing these general doctrines and distinctions in mind, let us consider the different states of facts to which they are applicable, and see how they have actually been applied by the courts.

[1] 3 N. E. Rep., 839.

[2] 1 Greenleaf on Ev., § 102.

[3] Ins. Co. v. Mosely, 8 Wall. 397, 405; Garth v. Howard, 8 Bing. R. 451.

[4] 1 Whart. Ev., §§ 265, 268, 259; 1 Greenleaf Ev., §§ 131, 133; 2 Addison on Torts (Wood's ed.), § 1375, p. 619, N. 1.

[5] Whitelock v. Baker, 13 Ves. 514; Berkley Peerage Cases, 4 Camp. 401, 417; Stockton v. Williams, Walker's Ch. 120; s. c., 1 Doug. (Mich.) 546: People v. Ins. Co., 25 Wend. 210; Stein v. Bowman, 13 Pet. 209; Chapman v. Chapman, 2 Conn. 347; s. c., 7 Am. Dec. 278; Stephens' Digest of Ev. (Chase's ed.), art. 31, p. 75; King v. Eriswell, 3 Term Rep. 723.

I. It has been contended that narrative statements and declarations of the causes of pain and suffering are admissible in cases where the sufferer is seeking to recover damages for the injury alleged to be the cause of the pain.[6]

And in some instances, as in the case just cited, the statements of the cause have been admitted, generally under the mistaken idea that a statement of the cause of an injury made just after its infliction, but not concurrently therewith, is admissible as a part of the *res gestæ*.

The better considered cases, however, hold such evidence inadmissible upon any ground.[7]

And in Missouri the doctrine of the Brownell case has been expressly denied.[8]

Perhaps the Supreme Court of the United States may be regarded as giving some countenance to the doctrine that declarations of the cause of an injury made some little time after its occurrence, are admissible to prove the cause.[9]

But the Mosely case, in which the doctrine was laid down, is so exceptional in its facts that it can scarcely be regarded as the expression of a general rule. Besides, the dissenting opinion of Mr. Justice Clifford in that case is generally considered more nearly in line with the authorities, than the majority opinion.

II. Declarations of the cause of an injury or of pain being inadmissible, the next question that arises is, are declarations of past pain and suffering admissible in behalf of the declarant as evidence that such pain was felt?

It may be conceded as beyond cavil that declarations that pain has been felt in the past, are not admissible when made to any person other than a physician.[10]

But it has been maintained, and there are authorities holding, that declarations that pain has been felt in the past are admissible to prove that such pain existed, if such declarations were made to a physician either to enable him: 1. To treat the declarant; or, 2. To form an opinion as to the condition of declarant, and the causes that produced the condition, so that he can testify in regard thereto.[11]

The three recent Indiana cases to which I have already referred, discuss but do not decide these questions, holding that none of the statements in controversy in those cases were declarations narrating past pain or suffering, but related wholly to pains existing at the time the declarations were made.[12]

An examination of the cases cited in note 11, *ante*, will show that the decisions there referred to, are distinctly divisible into two classes. One of these classes holds to the rule that narrative declarations of past pain and suffering, when made to a physician for the purpose of enabling him to treat the declarant, are admissible upon the ground that, as they are "made with a view to be acted on in a matter of grave personal concernment, in relation to which the party has a strong and direct interest to adhere to the truth," they come within the exception to the rule excluding hearsay.[13]

The other class ignores even this limitation and, either directly or inferentially, states the law as being that a physician to whom statements of past pain and suffering are made, when he is making an examination for the sole purpose of qualifying himself to give an expert opinion in a pending case, in which the declarant is interested, may give the declara-

[6] Brownell v. Pac. R. R. Co., 47 Mo. 270.

[7] Ill. Cent. R. R. v. Sutton, 42 Ill. 438; Gray v. McLaughlin, 26 Iowa, 279; Hall v. State, 48 Ga. 607; Ashland v. Marlborough, 99 Mass. 48; Waldele v. N. Y. Central R. R. Co., 95 N. Y. 274; Carthage Tp. Co. v. Andrews (Ind.), 1 N. E. Rep. 368; Cleveland, etc. Ry. Co. v. Newall, 3 N. E. Rep. 839; Roosa v. Boston Loan Co., 132 Mass. 440; 2 Addison on Torts (Wood's ed.) § 1375, N. 1. p. 620, 621; Pierce on Railroads, p. 298; Marshall v. C. & G. E. R. R., 48 Ill. 475; Mitcham v. State, 11 Ga. 615; Daily v. New York, etc. R. R. Co., 32 Conn. 356; Riggs v. State, 6 Coldw. (Tenn.) 517; C. C., etc. R. R. v. Mara, 26 Ohio St. 190.

[8] Adams v. Hannibal & St. Joe R. R. Co., 74 Mo. 528; S. C., 41 Am. Rep. 335.

[9] Ins. Co. v. Mosely, 8 Wall. 397.

[10] Bacon v. Charlton, 7 Cush. 581; Roosa v. Boston Loan Co., 132 Mass. 439; Cleveland, etc. Ry. Co. v. Newell (Ind.), 3 N. E. Rep. 839.

[11] Barber v. Merriam, 11 Allen, 322; Looper v. Bell, 1 Head, 376; Eckles v. Bates, 26 Ala. 655; Quaife v. Ry. Co., 48 Wis. 513; Kent v. Town of Lincoln, 32 Vt. 291; Howe v. Plainfield, 41 N. H. 28; Jones v. White, 11 Humph. (Tenn.) 268; Matteson v. New York Ry. Co., 35 N. Y. 487; Kennard v. Burton, 25 Me. 39; State v. Gedicke, 43 N. J. L. 88.

[12] Carthage Tp. Co. v. Andrews, 1 N. E. Rep. 368; L. N. A. & C. Ry. Co. v. Falvey, 22 Cent. L. J. 322; S. C., 3 N. E. Rep. 389; Cleveland, etc. Ry. v. Newall, 3 N. E. Rep. 839.

[13] Fay v. Harlan, 128 Mass. 245.

tions in evidence. If this is the law, the sooner it is changed the better for the cause of truth and justice.

The Quaife Case, *supra*, may be regarded as not fully holding to either of these doctrines. It seems to hold that declarations of past pain are sometimes admissible when made to non-attending physicians. But, as will be seen later, it is not a very satisfactory or consistent case.

In Barber v. Merriam, *supra*, it was mooted, but not decided, whether statements of past pain and suffering could be given in evidence on behalf of the declarant by a physician to whom they were made. The *dictum* of the court was that such statements would be admissible, but the *dictum* was expressly based on the proposition that to make them admissible, such statements must be made for the purpose of enabling the physician to treat the patient.[14]

The case of Aveson v. Kinnaird, 6 East, 188, is cited by Mr. Greenleaf; and generally quoted as sustaining the *dictum* in Barber v. Merriam. However, it scarcely sustains the portion of the 102d section of Greenleaf to which it is cited, and, indeed, owing to the loose way in which the case was reported, seems to have been much misunderstood. The point to which it is cited by Greenleaf is *obiter dictum*, and entitled to but little weight, as the doctrine enunciated in the case has been overruled in England, and denied and criticised in this country.[15]

Alike upon reason and the current of authority, the true rule in regard to narrative declarations of past pain and suffering, whether made to a physician for the purpose of receiving treatment, or otherwise, seems to be that they are not admissible in evidence in the declarant's favor.[16]

The legal reason why present declarations of past pain and suffering should not be admitted, is clear. The only ground upon which the admission of declarations or complaints of pain and suffering at any time can be justified is, either that such declarations and complaints are a part of the *res gestæ* of the injury that caused the pain; a part of the *res gestæ* of the pain itself, or, involuntary verbal acts indicating and expressing pain. Declarations of pain and suffering, made after the pain talked about has ceased, when it is a past event, do not come within the meaning of either of these doctrines.[17]

They are merely the unsworn statements of a party detailing past occurrences, and, though made to an attending physician to enable him to prescribe, they are not therefore admissible in evidence. It has been sought to justify the giving in evidence of such declarations upon the grounds: 1. That they are admissible as being the basis of an expert opinion; and, 2, that they are admissible upon the ground of necessity. The answer to this is plain. If they are not themselves admissible in the first place, the fact that an expert opinion is based upon them, cannot make them so. An expert opinion, based on facts inadmissible in evidence, is itself inadmissible.[18] Hearsay cannot be made evidence by basing an opinion upon it. And this rule should be applied equally to declarations of past and present pains.

Neither are declarations of past pains admissible upon the ground of necessity. If the declarant himself be a competent witness, he can testify what pains he suffered in the past. If he be incompetent, his declarations not a part of the *res gestæ* are incompetent also.[19]

[14] 11 Allen, 325.

[15] Stobart v. Dryden, 1 M. & W. (Exch.) 626; Frat. Life Ins. Co. v. Applegate, 7 Ohio St. 298; Runyan v. Price, 15 Ohio St. 7, 9; Jackson v. Kniffen, 7 Johns. 35; Marshall v. C. & G. R. R. Co., 48 Ill. 476, 479; Snover v. Blair, 1 Dutch (25 N. J. L.), 86.

[16] Caldwell v. Murphy, 11 N. Y. 416; Ashland v. Marlborough, 99 Mass. 47; Wilson v. Granby, 47 Conn. 59; Lush v. McDaniel, 13 Ired. L. 485; Ross v. Bank of Burlington, 1 Aikens (Vt.), 43; Ins. Co. v. Mosely, 8 Wall. 405; Bacon v. Charlton, 7 Cush. 581; Roosa v. Loan Co., 132 Mass. 440; Chapin v. Marlborough, 9 Gray, 244; Emerson v. Lowell Gas Light Co., 6 Allen, 148; Rowell v. Lowell, 11 Gray, 420; Carthage Tp. Co. v. Andrews (Ind.), 1 N. E. Rep. 368; 1 Greenleaf on Ev. (14th ed.), § 102, pp. 138, 139 and note "B." Riggs v. State, 6 Coldw. (Tenn.) 517.

[17] Reed v. R. R. Co., 45 N. Y. 577, 578; People v. Davis, 56 N. Y. 101, 102; Morehouse v. Heath, 99 Ind. 516; Emerson v. Gas Light Co., 6 Allen, 148; Jones v. State, 71 Ind. 81, 82; Hunnicutt v. Peyton, 102 U. S. (12 Otto) 364; Wetmore v. Mell, 1 Ohio St. 26; s. c., 59 Am. Dec. 608; Kyle's Admr. v. Kyle, 15 Ohio St. 20.

[18] Conley v. McDonald (Mich.), 8 Cent. L. J. 229; s. c., 40 Mich. 150; Hitchcock v. Burgett, 38 Mich. 507, 508; VanDeusen v. Newcomer, 40 Mich. 120; Koons v. State, 36 Ohio St. 200; Louisville, etc. Ry. Co. v. Shires, 108 Ill. 617; s. c., 19 Am. & Eng. R. R. Cas. 393.

[19] Cottrell v. Cottrell, 88 Ind. 88, 89; Schenck v. Sithoff, 75 Ind. 490; 1 Wharton on Ev. (2nd ed.), § 176, p. 167; Hopt v. People, 110 U. S. 579, 581; Whiteford v. Buckmyer, 39 Am. Dec. 645; Gilbert v. Gilbert, 58 Am. Dec. 270.

And, although a competent witness, he would not be permitted to testify in his own behalf to declarations of past pain and suffering he had made. This being true, it would be anomalous to hold that the party to whom such declarations were made, could testify to them for declarant, there being no question of motive, or intent, or good faith involved.

Taking the authorities as a whole, and considering the reason of the matter, it appears that declarations of past pain and suffering, narrative in their character, are not admissible in the declarant's favor, no matter to whom made, or for what purpose.

III. We are now to consider, whether or not, evidence of exclamations, expressions, involuntary movements of the body, cries, groans, etc., all indicating the existence of pain present at the time they are made, are admissible in behalf of the party making them, no matter to whom or in whose presence made, and without regard to the question whether made *ante* or *post litem motam*.

The answer to the question seems, and is, clear and simple. Such exclamations, expressions, cries, groans, and involuntary movements, may all be testified to, and described by any person, competent as a witness, in whose presence they were made or uttered.[20]

Such groans, exclamations, expressions and involuntrry movements of the body indicating present pain "are the natural language of the affection." They are such expressions as "usually and naturally accompany and furnish evidence of a present existing pain."

They are not admissible as exceptions to the rule excluding hearsay, but as original evidence, at once a part of the *res gestæ* of the pain existent when they are made, and the spontaneous emanations of such pain. They are not oral and verbal descriptions of the pain, but manifestations of it. They flow from it as naturally as blood flows from a fresh-cut wound.

They are not the party's talk about his pain, but the pain itself speaking in the usual and natural language of pain. The victim upon the rack did not complain that "his back hurt him." The beaded sweat upon his brow, the contortions of his body, the groans of agony, proved his pain. Evidence of such facts is always admissible. In so far as they are verbal, they may be called "verbal acts" or "verbal facts," but these terms are liable to serious misapprehension, and have been made the pretext for the introduction of descriptive statements of pain, more than once. It is better to regard them as part of the occurrence itself. The lightning flash of pain is followed by the thunder cry that tells it has made its mark. They are parts of the same thing and cannot be separated. When made *post litem motam* perhaps they should be scrutinized a little more closely than when made before the controversy existed, but this goes only to their weight not their admissibility. They may be feigned, but it is difficult for a man to naturally feign a natural expression of pain, and whether they are feigned or not is for the jury. The true application of this doctrine seems, at times, to have been misapprehended, and there are a number of cases where the party's talk about the pain he suffered, has been treated as the natural expression of the pain. The error is apparent.

IV. This brings us squarely to the consideration of the admissibility, in evidence, of declarations and statements that pain is felt at the time such statements are made. It is generally said that "declarations of present pain are admissible to whomsoever made," but that they are "of greater weight if made to a physician for the purpose of receiving treatment." [21]

And it is conceded that the admission of such declarations is "an exception to the general rule excluding hearsay evidence." [22]

They are generally "admitted upon the ground of necessity, as being the only means of determining whether pain or suffering is endured." [23]

And it has been claimed that their admissibility, no matter when or to whom made, cannot be questioned, but that they are al-

[20] Hagenlocher v. R. R. Co., 99 N. Y. 136; Wetmore v. Mell, 59 Am. Dec. 608.

[21] Ins. Co. v. Mosely, 8 Wall. 405; 1 Greenleaf on Ev., § 102; Cleveland, etc. Ry. Co. v. Newell (Ind.), 3 N. E. Rep. 839.

[22] Cleveland, etc. Ry. Co. v. Newall, *supra*.

[23] *Id.*

ways admissible, and their weight is for the jury.[24] Let us see if this is true.

The Quaife case, as we have seen, and it seems to stand alone, holds to the doctrine that declarations made *post litem motam*, for the sole purpose of qualifying physicians to testify as experts are admissible for the declarant if the physicians were neutral, or hostile to the party making the declarations, that is if they were part of the medical commission, selected by the parties jointly. or by the court, to examine the declarant; but it is intimated that if such declarations had been made *ex parte* and *post litem motam* for the sole purpose of qualifying physicians selected by the declarant to testify in his behalf that they would be inadmissible.[25]

Another case, more logical, if not more correct, holds that such *post litem motam* declarations, whether *ex parte* or to the members of a medical commission, are admissible.[26]

The distinction stated in the Quaife case, *supra*, can scarcely be maintained. The test of the admissibility of such declarations, if they are not always admissible, is, not alone, "To whom were they made?" but rather: "When were they made? What was their character? What were the circumstances surrounding their utterance?" [27]

Perhaps it may be thought that this statement of the test of admissibility confuses declarations and statements admissible as a part of the *res gestæ* only, with declarations accompanying an act and so interwoven with it that, when evidence of the act is admissible, the declarations are also admissible for either party. A moment's reflection will show that there is no such confusion. Pain is not an act, but a condition, or sensation, and while natural exclamations and expressions of pain are original evidence, as we have seen, and admissible whenever evidence of the pain they indicate is admissible, yet declarations and statements of pain, even of present pain, are after all, but descriptions, and as such not admissible except when a part of the *res gestæ* of such pain, or as exceptions to the rule excluding hearsay. In either event whether they are admissible or not should be determined by the court.[28]

But it is not universally conceded that declarations of present pain and suffering are admissible to whomsoever made. The time and circumstances when the declarations are made, it seems, may make them inadmissible.[29] (And see cases cited to note 28.)

And it would appear that the same principles should govern their admission that govern the admission of other classes of hearsay evidence. That is, they should not be admitted unless "made under such circumstances as to free them from the suspicion of having been made with reference to pending or future litigation." [30]

It may be taken as the prevailing doctrine of the cases, that declarations, statements and representations of present pain and suffering made to a physician for the purpose of enabling him to treat the declarant, are admissible in evidence in declarant's favor without regard to the time when they are made.[31]

But while this question is, perhaps, *stare decisis*, it may well be doubted whether it is sound in principle, however convenient it is

[24] Murphy v. R. R. Co., 66 Barb. 129; Matteson v. R. R. Co., 35 N. Y. 487; Cleveland, etc. Ry. Co. v. Newell, *supra*.

[25] Quaife v. R. R. Co., 48 Wis. 513.

[26] L. N. A. & C. Ry. Co. v. Falvey, 22 Cent. L. J. 324; s. c., 3 N. E. Rep. 389.

[27] 1 Addison on Torts (Woods' ed.), § 1375, pp. 624, note, p. 623; Riggs v. State, 6 Coldw. (Tenn.) 517; Alabama, etc. Ry. v. Hawk, 72 Ala. 112; s. c., 47 Am. Rep. 404; Lund v. Tynsburough, 9 Cush. 36; 1 Greenleaf on Ev., § 108.

[28] 2 Addison on Torts (Wood's ed.), note on pp. 619, 621, 623; Ross v. Bank of Burlington, 1 Aiken (Vt.), 43; s. c., 15 Am. Dec. 664; Hagenlocher v. R. R. Co., 99 N. Y. 136; Frink v. Coe, 61 Am. Dec. 142; Kyle's Admr. v. Kyle, 15 Ohio St. 20; Wetmore v. Mell, 1 Ohio St. 26; s. c., 59 Am. Dec. 608.

[29] Grand Rapids R. R. v. Huntley, 38 Mich. 538, 543, 545; Darrigan v. R. R. Co., 52 Conn. 285, 291, 309; Reed v. R. R. Co., 45 N. Y. 577, 578; Fay v. Harlan, 128 Mass. 244, 245; Bacon v. Charlton, 7 Cush. 586; Chapin v. Marlborough, 9 Gray, 245: Rowell v. Lowell, 11 Gray, 420, 422.

[30] 1 Whart. Ev. (2d ed.), §§ 259, 265, 268; 1 Greenlf. Ev., §§ 131, 133; Fayette v. Chesterville (Me.), 1 East. Rep. 59; Stephens' Dig. of Ev. (Chase's), art. 31, p. 75; Hunnicutt v. Peyton, 102 U. S. (12 Otto), 363, 364; 2 Addison on Torts (Wood's ed.), § 1375, p. 619, N. 1.; Whitelocke v. Baker, 13 Vesey, 514.

[31] Barber v. Merriam, 11 Allen, 322; Fay v. Harlan, 128 Mass. 244, 245; Bacon v. Charlton, 7 Cush. 586; Chapin v. Marlborough, 9 Gray, 245; Looper v. Bell, 1 Head (Tenn.), 375; Eckles v. Bates, 26 Ala. 655; Kennard v. Burton, 25 Me. 39; State v. Gedicke, 43 N. J. L. 88; Kent v. Town of Lincoln, 32 Vt. 591; Towle v. Blake, 48 N. H. 95; Murphy v. R. R. Co., 66 Barb. 129; Carthage Tp. Co. v. Andrews (Ind.), 1 N. E. Rep. 368; Hyatt v. Adams, 16 Mich. 180; Elliott v. Van Buren, 33 Mich. 49; Cleveland, etc. Ry. Co. v. Newell (Ind.), 3 N. E. Rep. 840.

in practice. It is not true that, because such statements are necessary to enable the physician to treat the patient, that they are therefore admissible in evidence.

The physician seeks to know the cause of the disease and the seat of the pain in order that he may cure it. The court must learn the cause of the pain from other evidence than the declarations of the sufferer, and evidence of the existence of the pain itself is only admissible for the purpose of showing how the party has suffered, or is suffering, in order that the extent of his damages may be ascertained. The best evidence for this purpose is not the unsworn declarations of the party, but his sworn statements on the witness stand, or his natural expressions and exclamations of pain.

Nothing is better settled than the rule, that when a witness can be called by a party, that party will not be permitted to prove his unsworn declarations.[32]

That which a plaintiff can prove by his own sworn statements, being a competent witness, he is not permitted to prove by statements which are unsworn. His declarations a part of the *res gestæ* of some subject of inquiry may be proved, but otherwise they are incompetent.[33]

It is difficult to see how spoken declarations or representations of existing pain can be a part of the *res gestæ* of such pain. If the pain is not an act, they are not declarations accompanying an act. Nor can we regard such descriptive statements of present pain as the natural language of such pain. The greatest sufferers seldom say they suffer for the purpose of indicating their pain. Such declarations are not admissible merely because they accompany the act of the party in submitting himself to examination, for it is the existence of the pain, of a bodily condition or sensation, not the fact that a doctor examined the person, that is the subject inquired about. This applies equally to examinations made by physicians for the purpose of treatment, or to qualify themselves to testify as expert witnesses.

In any event the admission of such declarations is an exception to the general rules of evidence, and the exception should not be extended, but rather curtailed in these days of expert evidence.[34]

In one Massachusetts case at least, and that decided in the days when Shaw, Metcalf and Bigelow graced the bench, the rule that is conceived to be the true one was applied, and the court held that an attending physician could not give an opinion based on what he had observed of the plaintiff while treating her coupled with her statements to him of the then present pain, but must be limited to the actual results of his examination. In other words the physician was not allowed either to give an opinion based on his patient's declarations of present pain, or to state those declarations in evidence.[35]

The last cited case, and the case of Hagenlocher v. R. R. Co.,[36] when considered together, seem to present the doctrine of the admissibility of exclamations of present pain and suffering in its most correct form. Descriptions, whether of past or present pain, and opinions founded upon them, even those of an attending physician are alike excluded.

But as we have seen, many of the courts are so firmly wedded to the doctrine that declarations of present pain and suffering made to an attending physician, are always admissible, that the exception must be recognized as the established rule in most States.

The courts do not even limit the rule to statements and declarations made *ante litem motam*, although the doctors themselves say that but little weight should be given to the statements of a patient when made pending litigation.[37]

But does it follow that because statements and declarations of present pain and suffering are always admissible, when made to an attending physician by his patient, that such declarations and statements are always admissible, when made to non-experts or to physicians who are making an examination solely to qualify themselves to testify as witnesses?

[32] 1 Whart. Ev. (2d ed.), § 176, p. 167; Bristol v Dann, 27 Am. Dec. 123; Fitch v. Chapman, 10 Conn. 11, 12. And see cases cited *ante* 18.

[33] 2 Wharton on Ev. (2d ed.), § 1101; 1 Wharton on Ev. (2d ed.), § 267.

[34] 1 Wharton on Ev. (2d ed.), §§ 259, 265, 268, 269; Bacon v. Charlton, 7 Cush. 586.

[35] Rowell v. Lowell, 11 Gray, 420 and 422.

[36] 99 N. Y., 136.

[37] Quain's Med. Dict., pp. 1467-1468.

The Quaife and Falvey cases, *supra*, seem to answer the question affirmatively, and the case of State v. Gedicke,[38] has been quoted to the same point, while Matteson v. R. R. Co.,[39] leans the same way. The first named case, as we have seen, is inconsistent in itself, and its reasoning unsatisfactory. The Gedicke case is so uncertainly reported, that it cannot be told whether the relation of patient and physician existed or not, but it rather looks as though it did. The Matteson case shows that the declarant did not know that the physician to whom she made the declarations was to be called as an expert, and that case also proceeds upon the position, which seems to be untenable, that the question raised is not one of the admissibility of such declarations for the court to determine, but merely a question of the weight that should be given them by the jury.

The Falvey case, however, is squarely in point, and its force cannot be evaded or denied; for, in that case, declarations of present pain and suffering were made to a medical commission, and their admission in evidence was approved.

Opposed to these four cases are the cases of Grand Rapids R. R. Co. v. Huntley,[40] Darrigan v. R. R. Co.,[41] Rowell v. Lowell,[42] Reed v. R. R. Co.,[43] Fayette v. Chesterville,[44] Hagenlocher v. R. R. Co.,[45] and, in principle at least, even Barber v. Merriam, *supra*, and nearly all the cases heretofore cited to the point that declarations of present pain made to a physician for the purpose of enabling him to treat the declarant are admissible, because "made with a view to be acted on in a matter of grave personal concernment, in relation to which the party has a strong and direct interest to adhere to the truth."

The very reason for their admission in such cases is a reason for their exclusion when made *post litem motam* to physicians, or others, whose purpose is to testify, or who may be called as witnesses by the declarant. The Supreme Court of Michigan, in the Huntley case, directly decided that declarations of present pain and suffering made to a physician *post litem motam*, for the sole purpose of enabling him to testify, were not admissible as exceptions to the rule excluding hearsay, but plainly were within the mischief of the excluding rule. "The purpose of the examination," says the court, "removed the ordinary safeguards which furnish the only reason for receiving declarations which bear in a party's own favor." To the same effect is the Darrigan case, *supra*. The rule admitting such declarations should not apply "except when at the time the declarations were made the declarant could not have anticipated the circumstances which make the declaration material." [46]

Neither is there any necessity which will justify the giving in evidence of declarations made under such circumstances. If the declarant be an incompetent witness his declarations are also incompetent,[47] although his exclamations, groans and movements indicating the presence of pain, are admissible on the grounds heretofore stated.

And if he be a competent witness, he can himself testify to the pains he felt while being examined by the experts.[48]

His exclamations of pain and suffering, and any movements he may have made indicating present pain, while being examined by the experts, even though the examination be an *ex parte* one, will, as we have seen, be fit subjects for the experts to testify about.

The conclusions, then, to which the cases lead us as to this question, are: That *post litem motam* declarations and statements of present pain are not admissible in behalf of the declarant when made either to a non-expert, or to a non-attending physician examining simply to make medical testimony or to determine the condition of the party. That exclamations and cries of pain and movements indicating pain, no matter in whose presence, or when made, can be described by any witnesses who hear or see them. That, on principle, it is doubtful whether declarations of present pain and suffering made *post*

[38] 43 N. J. L., 88.
[39] 35 N. Y., 487.
[40] 38 Mich., 543.
[41] 52 Conn., 285.
[42] 11 Gray, 420, 422.
[43] 45 N. Y., 577, 578.
[44] 1 East. Rep., 59.
[45] 99 N. Y., 136.

[46] Ross v. Bank of Burlington, 1 Aikins (Vt.), 43.
[47] Cotrell v. Cotrell, 81 Ind. 88, 89; Schenck v. Sithoff, 75 Ind. 490.
[48] Reed v. R. R. Co., 45 N. Y. 577, 578.

litem motam, even to an attending physician, should be admitted. That it is clear that declarations and statements of present pain and suffering, as distinguished from exclamations, groans, movements, and the natural expressions of pain, should never be admitted when made *post litem motam* to a non-expert. And finally it is submitted that the true rule is that non-experts should never be allowed to detail declarations and statements of past or present pain, and that attending physicians should only be allowed to describe and repeat complaints, exclamations, expressions or movements made by their patients and indicating, apart from the words used, the present existence of pain. "Evidence of such a nature ought always to be kept within the strictest limits to which the cases have confined it." [49]

To hold otherwise is to put a premium upon falsehood, deprive a party litigant of the right of cross-examination, and give the other party the benefit of his unsworn statements as evidence of the existence of the facts stated. It is not safe to thus relax the rules of evidence, and break down the barriers that the law has erected to keep falsehood from defeating the ends of justice, without being subject to the pains and penalties of perjury.

W. H. RUSSELL.

Frankfort, Ind.

[49] Garth v. Howard, 8 Bing. R. 451.

NUISANCE — NEGLIGENCE — LANDLORD AND TENANT—RESPECTIVE LIABILITY FOR INJURIES CAUSED BY UNSAFE CONDITION OF DEMISED PREMISES.

WOLF v. KIRKPATRICK.

New York Court of Appeals, Filed January 19, 1886.

NUISANCE. — *Defective Coal-Hole — Liability of Landlord.*—Where there has been a permit from the city to construct a coal-hole under a sidewalk, with an opening leading to it, and while it is under the entire control of a tenant, through a defect in the stone, caused by strangers, plaintiff is injured, she cannot recover against the owner of the premises merely because he is the landlord. He is not liable unless the injury was caused by some fault on his part; and where it was the tenant's duty to repair the stone, and his neglect which left it unsafe, there is no liability on the part of the owner.

W. F. MacRae, for appellant, Walter F. Kilpatrick; *H. Morrison*, for respondent, Rebecca Wolf.

FINCH, J., delivered the opinion of the court:

The defendants who appeal were shown to be the owners of premises which had vaults for the storage of coal extending under the sidewalk. The plaintiff was injured by a defect in the stone supporting the cover of the opening, which arose while such premises were in the occupation of one McPherson and others, who were tenants having entire control of the premises. The defect was not one of original construction, but occured through the act and interference of third persons engaged in building the elevated railway, and who broke the stone supporting the iron cover so that it turned under plainsiff's weight and occasioned the injury. We do not know at what time prior to the accident the defendants became owners. The building and the vault were constructed by McPherson; and if, at the time, the appellants were owners, and responsible for the work actually done, it is still established that the vaults were built under a permit from the city, and in accordance with that license. The coal-hole and its cover were safely and properly constructed, and in the usual and permitted manner. The case is not, therefore, within the doctrine of Clifford v. Dam, 81 N. Y. 52, and the kindred authorities cited by the respondent. In that case no permission or license from the municipality to make the excavation was either pleaded or proved, and the construction of the vaults was an unauthorized wrong and a nuisance, for the consequences of which the ownor was responsible, irrespective of the question of negligence. There was the same lack of special authority in most of the other cases to which we are referred. Anderson v. Dickie, 1 Robt. 238; Diggert v. Schenck, 23 Wend. 446; Congreve v. Morgan, 18 N. Y. 79. Nor is the case one in which the owner or landlord has let the premises when in a defective and dangerous condition, (Davenport v. Ruckman, 37 N. Y. 568,) for the proof establishes no such ground of liability.

The evidence does not disclose the precise legal relation existing between the occupants and owners. The former were tenants of some kind, although it does not appear that any rent was reserved or paid to the owners, or that the latter were even in possession at all. On the contrary, McPherson testified that from the time he built the houses, which was in 1857, to the time of the accident, he had the care and control of the premises, both as owner and occupant; so that the recovery must stand, if at all, upon the sole ground that an owner, who has constructed vaults under the sidewalk lawfully, and with due prudence and and care, and transferred possession of the premises, if he ever had it, to third persons, without covenant on his part to repair, is liable for a defect in the vault covering, which afterwards occurs through the interference of a stranger, although he may have had neither notice nor knowledge of the defect. The court went so far in the case as to charge that "if the plaintiff sustained injury by

reason of the defective condition of said coal-hole, and without contributory negligence, then said defendants Kilpatrick are liable in damages," to which there was an exception. The court was asked to charge "that notice of the alleged condition of the coal-hole must have been given to the Kilpatricks before they could be held liable as owners, when the possession was in McPherson," and that, if McPherson was in the control and care of said premises, and deriving all the benefit therefrom, he alone is liable to the plaintiff." These requests were refused, and the appellants excepted. The basis on which the case was sent to the jury was still more clearly developed in the course of the charge. After stating the liability of the city as founded upon negligence, and involving notice, actual or constructive, of the alleged defect, the learned court added:

"The law is a little more severe with respect to the owners of the premises for whose benefit this hole in the sidewalk has been authorized. It holds them to a stricter liability. A party injured by falling through any coal-hole in the sidewalk is not bound in the case of the owner of the premises to show that the owner had notice that the hole was out of repair. It appears, according to the current of decisions, that the owner of premises is bound to see that the coal-hole, and the cover of it, afford such as safe a passage to the wayfarer as any other portion of the sidewalk. Therefore the question with respect to these defendants, who are the owners of the property, is simply how much they should be required to pay the plaintiff."

The doctrine of the trial court was thus made extremely plain. It went upon the ground that the defect in the vault-stone was a nuisance for which the vault-owner was responsible, though out of possession and control, without the least knowledge of the fact, and when the defect was produced by the interference and misconduct of strangers.

It may be that the condition of the coal-hole in the sidewalk became a nuisance while McPherson was in possession, and after the stone was broken, (Swords v. Edgar, 59 N. Y. 34;) but, if so, the party responsible can only be the person who either creates the nuisance or suffers it to continue. The owners did not create it, that was the wrongful act of strangers. How can it be said that they suffered it to continue, and so failed in their duty, if they had no knowledge, actual or constructive, of the defect, and were out of possession and control? That can only be true on the theory that every owner of rented property in New York is bound to watch the sidewalks and coal-holes in front of his premises, and protect them against unauthorized trespassers, and is bound to know when such trespass is committed. We are aware of no case which goes so far as that. In Swords v. Edgar, *supra*, the premises were a pier upon which the public having business were invited to go, and which became dilapidated, whereby injury arose. That condition was denominated a nuisance, for which, primarily, the lessee in the actual occupation was liable: and he was held to be so liable, independant of any covenant to repair, and solely by force of the occupancy. But it was also held that the lessors were liable, and upon the ground that the pier was unsafe when demised, and they took a rent for it in that condition. The whole drift of the opinion shows that the landlord ont of possession is not responsible for an after-occurring nuisance, unless in some manner he is in fault for its creation or continuance. His bare ownership will not produce that result. It was said in Clifford v. Dam, *supra*, that proof of authority from the municipality to build the vault would mitigate the act from an absolute nuisance to an act involving care in the construction and maintenance. In Clancy v. Byrne, 56 N. Y. 133, it was held that if the premises are in good repair when demised, but afterwards become ruinous and dangerous, the landlord is not responsible therefor, either to the occupant or the public, unless he has expressly agreed to repair, or has renewed the lease after the need of repair has shown itself. In the recent case of Edwards v. New York & H. R. Co., 98 N. Y. 248, the circumstances under which the landlord may become liable are very fully considered, with the declared result that "the responsibility of the landlord is the same in all cases. If guilty of negligence, or other *delictum* which leads directly to the accident and wrong complained of, he is liable; if not so guilty, no liability attaches to him."

It is quite certain, then, that the plaintiff in this case was bound to establish some fault of omission or commission on the part of the landlord leading to the injury, and barely showing him to be owner, is not enough. There was no fault of commission. That is conceded. There could be no fault of omission, unless the landlord was bound to repair the defect, had actual or constructive notice of the defect, or was bound at his peril to discover and remedy it. No such duty rested upon him. It was the tenant's duty to repair the stone; it was his neglect which left it unsafe; and the landlord was not shown to be in any respect in fault. The charge made him liable barely from the fact of ownership, and was erroneous.

The judgment should be reversed, and a new trial granted; costs to abide the event.

(All concur, except, MILLER, J., absent.)

NOTE.—I. *Liability for Excavations Generally.*—Another thing that interferes with the safety of a person exercising ordinary care in passing over a highway is a nuisance, and the party who created, or the one who continues the nuisance, is liable, irrespective of the question of his negligence.[1]

[1] Congreve v. Smith, 18 N. Y. 79; Congreve v. Morgan, 18 N. Y. 84; Harlow v. Humister, 6 Cow. (N. Y.) 189; Wood v. Mears, 12 Ind. 515; Ball v. Armstrong, 10 Ind. 181; Dygert v. Schenck, 23 Wend. 446; Irving v. Fowler, 5 Rob. (N. Y.) 482; Davenport v. Ruckman, 10 Bosw. 20; Bunyon v. Bordine, 2 Green, N. J. 472; Barnes v. Ward, 14 Jur.

II. *Landlords not Liable Usually.*—In England and several of the States, landlords, being out of possession and not bound to repair, are not liable for injuries received in consequence of the neglect to repair defective areas or coal holes lawfully built under sidewalks,[2] unless the defect existed at the time the lease was made.[3]

III. *Contractor's Liability.*—Generally the maxims of *respondeat superior*, which exists in the cases of principal and agent, and master and servant, is not applicable to contractors, but sometimes a contractor acts also as an agent, and then the maxim applies, as, for instance, where a contractor for building public sewers acts not only for himself, but also as an agent of the city.[4] Where private parties cause an excavation to be made in the highway, they are liable for all damages that result therefrom, unless the damage follows from the manner in which the work was done, and not as a consequence of the work,[5] in which case the contractor alone would be liable. But if the excavation was made without lawful authority the negligence of the contractor would be no defense to the principal.[6]

IV. *Excavations Adjoining Highways.*—An owner who makes a dangerous excavation on his own land near a frequented street is liable to a person who, while using the highway and exercising ordinary care, accidentally falls into the hole and suffers damage,[7] but no liability against the owner for maintaining a covered area in the highway ensues where the area existed at the time of the dedication of the highway to the public.[8]

V. *Excavations in Highways.*—There is a difference between municipal corporations and *quasi* corporations, such as counties, townships and the towns of New England, with regard to their liability for defective highways. In the United States there is no common law obligation resting upon the latter class to repair their highways, and they are not obliged to do so, unless by statute.[9] But, generally, where municipal corporations are given the control of their streets and ample power to remove nuisances, they are held responsible for all injuries that result from a failure to properly exercise the powers possessed by them,[10] but if the defect is occasioned by the wrongful act of another, notice to the corporation of the defect is essential to create liability.[11]

VI. *Sewers.*—With regard to municipal corporations there is a distinction between legislative and ministerial duties,[12] the latter class being absolute and imperative, and arising from the performance of a duty prescribed by ordinance. For the imperfect performance of legislative duties there is no implied liability, but for the negligent discharge of a ministerial, private or corporate duty, there is a common law liability. The work of constructing and keeping in repair sewers, drains and gutters is ministerial.[13]

334; Hadley v. Taylor, L. R. 1 C. P. 53; Holmes v. N. E. R. R. Co., L. R. 4 Excheq. 254; Robbins v. Jones, 15 C. B. (N. S.) 221; Coupland v. Hardrington, 3 Camp. 338; Smith v. State, 6 Gill. (Md.) 425; Bush v. Johnson, 23 Penn. St. 209; Chicago v. Robbins, 2 Black. (U. S.) 418; 4 Wall. 657; Rowell v. Williams, 29 Iowa, 210; Pfau v. Reynolds, 53 Ill. 212; Severin v. Eddy, 52 Ill. 189; Beatty v. Gilmore, 16 Penn. St. 463; Durant v. Palmer, 5 Dutch. (N. J.) 544.

[2] Gott v. Grundy, 22 Eng. L. & Eq. 173; Leavitt v. Fletcher, 10 Allen, 121; Elliot v. Aiken, 45 N. H. 30; Estee v. Estee, 23 Ind. 114; Fisher v. Thurkell, 21 Mich. 1; Payne v. Rogers, 2 H. Bl. 350; Lowell v. Spaulding, 4 Cush. 277; Chantler v. Robinson, 4 Excheq. 163; Russell v. Shenton, 3 Ad. & E. (N. S.) 449; Bishop v. Bedford Charity, 1 E. & E. 697; Cheetham v. Hampson, 4 T. R. 318; Offerman v. Starr, 2 Penn. St. 394; Bears v. Ambler, 9 Penn. St. 193; Owingg v. Jones, 9 Md. 108; Clark v. Fry, 8 Ohio St. 358.

[3] Rich v. Basterfield, 4 M. G. & S. 783; Tod v. Flight, 9 C. B. (N. S.) 377; Smith v. Elliott, 9 Penn. St. 345; Hellwig v. Jordan, 53 Ind. 21; Grady v. Wolsner, 46 Ala. 381.

[4] Detroit v. Corey, 9 Mich. 184; Lowell v. B. & L. R. R. Co. 23 Pick. 24; Hilliard v. Richardson, 3 Gray, 249.

[5] Chicago v. Robbins, 2 Black. (U. S.) 418.

[6] Creed v. Hartman, 29 N. Y. 591; Samuelson v. Wine Co. 49 Mich. 173.

[7] Temperance H. Ass'n v. Giles, 33 N. J. 260; Bacon v. Boston, 3 Cush. 174; Veazie v. P. R. R. Co, 49 Me. 119; Silvers v. Nordlinger, 30 Ind. 53; Vale v. Bliss, 50 Barb. 358; Bird v. Holbrook, 4 Bing. 628; Norwich v. Breed, 30 Conn. 535; Mandersched v. Dubuque, 29 Iowa, 73; Parker v. Macon, 39 Ga. 725; Rowell v. Williams, 29 Iowa, 210. Compare Howland v. Vincent, 10 Met. 371; Hardcastle v. R. R. Co. 4 H. & N. 67; Howe v. New Orleans, 12 La. 481; Hounsell v. Smith, 7 C. B. (N. S.) 731.

[8] Fisher v. Prouse, 110 Eng. Com. Law, 770, and cases reviewed; Beach v. Frankenberger, 4 W. Va. 712.

[9] Sutton v. Board, 41 Miss. 236; Larkin v. Saginaw Co., 11 Mich. 88; Cooley v. Freeholders, 3 Dutch. (N. J.) 415; Freeholders v. Strader, 3 Harr. (N. J.) 108; Pray v. Jersey City, 32 N. J. Law, 394; Huffman v. San Joaquin County, 21 Cal. 426; Hedges v. Madison County, 1 Gilm. (Ill,) 567; Detroit v. Blackeby, 21 Mich. 84; Toper v. Henry County, 26 Iowa, 264.

[10] Thurston v. St. Joseph, 51 Mo. 510; Wilson v. New Bedford, 108 Mass. 261; Phinzy v. Augusta, 47 Ga. 263; Savannah v. Cullens, 38 Ga. 334; New York v. Furze, 3 Hill, 614; Bacon v. Boston, 3 Cush. (Mass.) 179; Raymond v. Lowell, 6 Cush. (Mass.) 529; Kelsey v. Glover, 15 Vt. 715; Chamberlain v. Enfield, 43 N. H. 356; Bailey v. New York, 3 Hill, 531; Brower v. New York, 3 Barb. 254; Buffalo & Hamburgh T. Co. v. Buffalo, 1 N. Y. 537; Pittsburgh v. Grier, 21 Penn. St. 51; Conirs v. Wood, 10 Barr (Penn.), 93; Gilmartin v. Philadelphia, 71 Penn. St. 140; Hyde v. County of Middlesex, 2 Gray (Mass.), 267; Trustees v. Gibbs, 11 H. L. Cas. 687; Thayer v. Boston, 19 Pick. (Mass.), 511; Oliver v. Worcester, 102 Mass. 490; St. John v. Mayor, 3 Bos. (N. Y.) 483; (Compare Eastman v. Meredith, 36 N. H. 284; Sawyer v. Northfield, 7 Cush. 490;) Detroit v. Casey, 9 Mich. 165; Lord v. Mayor, 1 Seld. (N. Y.) 369; West v. Brockport, 16 N. Y. 161; Chicago v. Major, 18 Ill. 349; (Compare Chicago v. Starr, 42 Ill. 174;) Dayton v. Pease, 4 Ohio St. 80; Cincinnati v. Stone, 5 Ohio St. 38; Wendell v. Troy, 39 Barb. 329; Mayor v. Sheffield, 4 Wall. 189; Grant v. Brooklyn, 41 Barb. 381; Baltimore v. Pennington, 15 Md. 12; Pfau v. Reynolds, 53 Ill. 212; Brooks v. Somerville, 106 Mass. 271; Covington v. Bryant, 7 Bush. 248; Hutson v. Mayor, 9 N. Y. 163; Hickok v. Plattsburg, 16 N. Y. 161; Bloomington v. Bay, 42 Ill. 503; Atchison v. King, 9 Kansas, 550; Serrot v. Omaha, 1 Dillon, C. C. R. 312; Griffin v. Mayor, 9 N. Y. 456; Tallahassee v. Fortune, 3 Fla. 19.

[11] Dewey v. Detroit, 15 Mich. 307; Requa v. Rochester, 45 N. Y. 129; McGinity v. Mayor, 5 Duer, 674; Dorlon v. Brooklyn, 46 Barb. 604; Doulson v. Clinton City, 33 Iowa, 397; Cleveland v. St. Paul, 18 Minn. 279; Hume v. New York, 47 N. Y. 639; McCarthy v. Syracuse, 46 N. Y. 194; Rapho v. Moore, 68 Penn. St. 404; Centralia v. Krouse, 64 Ill. 19; Ward v. Jefferson, 24 Wis. 342; Hubbard v. Concord, 35 N. H. 52; Johnson v. Haverhill, 35 N. H. 74; Reed v. Northfield, 13 Pick. 94; Worster v. Canal Co. 16 Pick. 541; Hart v. Brooklyn, 36 Barb. 226; Weightman v. Washington, 1 Black, 39; Manchester v. Hartford, 30 Conn. 118; Hove v. Lowell, 101 Mass. 99; Bloomington v. Bay, 42 Ill. 509.

[12] Mills v. Brooklyn, 32 N. Y. 489; McCarthy v. Syracuse, 46 N. Y. 194.

[13] Barton v. Syracuse, 36 N. Y. 54; 37 Barb. 292; Child v. Boston, 4 Allen, 41; Emery v. Lowell, 104 Mass. 13; McGregor v. Boyle, 34 Iowa, 268; Detroit v. Corey, 9 Mich. 165; Dermont v. Detroit, 4 Mich. 435; Ross v. Madison, 1 Ind. 281; Brine v. R. R. Co. 110 Eng. Com. Law, 402, cited 11 H. L. Cas. 714; Sprague v. Worcester, 13 Gray, 193; Proprietors v. Lowell, 7 Gray, 223; Flagg v. Worcester, 13 Gray, 601; City Council v. Gilmer, 33 Ala. 116; Conrad v. Ithaca, 11 N. Y. 158; Cowley v. Sunderland, 6 H. & N. 565. Commissioners are not liable for the negligence of those they are obliged to employ, but are liable for their own misconduct; Hall v. Smith, 2 Bing. 156; Mersey Docks Cases, 11 H. L. Cas. 713.

VII. *Remedies.*—A city has power to remove or prevent obstructions in the public streets,[14] and it is its duty to exercise these powers. If an injured person fail in his action against the municipality he may proceed against the author of the nuisance,[15] but if he succeed against the city, it has a remedy over against the wrong doer,[16] and if the latter had notice of the suit he is concluded as to the amount of damage occasioned by the disaster.[17]

VIII. *Duty of Towns to Repair Highways.*—By statute in nearly all of the States, towns must keep their roads safe, even though another party be bound by statute to the same duty,[18] and the town's obligation extends also to the margin of the highway,[19] and in so far as necessary to keep the highway in condition the town has a right to the soil, timber and stones upon its surface, but, with this exception, the owner of the adjacent land owns whatever grows upon the soil and the mines beneath.[20]

IX. *Quarries and Mines.*—The owner of a quarry may injure the surface of the land,[21] but a mine owner, unless express power be given him to produce a subsidence of the surface, and provided that the surface owner has done nothing with his own land contributing to produce an injury,[22] is liable to the owner of the surface for all damages sustained by reason of any subsidence.[23] Negligence need not be proved, and the highest care and skill is no defense if injury results from operating the mine.[24]

X. *Surface Owners.*—The surface owner may use his land in the ordinary modes, but if he brings anything upon his premises which, if it escapes, will damage the mine owner, he is liable for the injury caused by his act, whether guilty of negligence or not.[25]

XI. *Adjacent Owners.*—Every land owner has a right to have his soil preserved intact, but the right of lateral support only extends to the soil, and not to walls or buildings,[26] and the only restrictions as to them placed upon the adjacent owner is that he must not negligently or carelessly excavate his own land. The statute of limitations begins to run when damage results.[27]

XII. *Private Ways.*—Every person who keeps open a private path to his house or place of business thereby invites people having occasion to go over it to his premises, to do so, and he is bound to keep it in a safe condition, and is liable for any defects therein, or for neglect to construct proper guards around dangerous excavations.[28] But if a person leave the usual path

[14] Baker v. Boston, 12 Pick. 184; Com. v. Stodder, 2 Cush. 562; Jackson v. People, 9 Mich. 111; Noyes v. Ward, 19 Conn. 250; Hawley v. Harroll, 19 Conn. 142; R. R. Co. v. Chenon, 43 Ill. 209; Philadelphia v. R. R. Co. 58 Penn. St. 253; Com. v. Brooks, 99 Mass. 434; Irvine v. Fowler, 5 Rob. (N. Y.) 482; Nelson v. Godfrey, 12 Ill. 22; Cobb v. Standish, 14 Me. 198; Runyon v. Bordine, 2 Greene (N. J.) 472; Scammon x. Chicago, 25 Ill. 424; Hayden v. Attleborough, 7 Gray (Mass.), 338; Norris v, Litchfield (where a trespasser recovered), 35 N. H. 271; Hunt v. Pownal, 9 Vt. 411; Collins v. Dorchester, 6 Cush. 396; Kimball v. Bath, 38 Me. 219; Palmer v. Andover, 2 Cush. 600; Ireland v. Oswego T. Co. 13 N. Y. 526; Joliet v. Virley, 35 Ill. 58; Hyatt v. Rondout, 44 Barb. 385; Chicago v. Gallagher, 44 Ill. 295; Davis v. Hill, 44 N. H. 329; Portsmouth v. Wiley, 35 N. H. 303; State v. Bangor, 30 Me. 341; Houfe v. Fulton, 29 Wis. 296; Munson v. Derby, 37 Conn. 298; Alger v. Lowell, 3 Allen, 398.

[15] Severin v. Eddy, 52 Ill. 189.

[16] Chicago v. Robbins, 4 Wall. 657; Portland v. Richardson, 54 Me. 46; Milford v. Holbrook, 9 Allen, 17; Brooklyn v. City R. R. Co. 47 N. Y. 475.

[17] Boston v. Worthington, 10 Gray, 496; Veazie v. R. R. Co. 49 Me. 119; Mayor v. Troy, etc. R. R. Co. 49 N. Y. 657; effect of record in former action, King v. Chase, 15 N. H. 1; Littleton v. Richardson, 34 N. H. 179; Westchester v. Apple, 35 Penn. St. 284; as to necessity of notice, Griffin v. Mayor, 9 N. Y. 456; Durant v. Palmer, 5 Dutch. (N. J.), 544; P. & O. C. Co. v. Graham, 63 Pa. St. 290; Decatur v. Fisher, 53 Ill. 407; Serrott v. Omaha, 1 Dill C. C. R. 312; Van Dyke v. Cincinnati, 1 Disney, 532; Mersey Docks v. Gibbs, 11 H. L. Cas. 687; Weisenberg v. Appleton, 26 Wis. 56; but when city is in fault notice is unnecessary; Springfield v. La Claire. 49 Ill. 476; Chicago v. Johnson, 53 Ill. 91. As between landlord and tenant for cases where the owner has been held liable, see Durant v. Palmer, 5 Dutch. 544; Shipley v. 50 Associates, 106 Mass. 194; Milford v. Holbrook, 9 Allen, 17; Kirby v. Market Association, 14 Gray, 249; Stepheni v, Brown, 40 Ill. 428.

[18] Currier v. Lowell, 16 Pick. 170; Wallace v. New York 2 Hilton, 440; Davis v. Leominster, 1 Allen, 182; Phillips v. Veazie, 40 Me. 96; Kirby v. Boylston Market, 14 Gray, 249; compare Vinal v. Dorchester, 7 Gray, 423.

[19] Cassady v. Stockbridge, 21 Vt. 391; Rice v. Montpelier, 19 Vt. 470; Dickey v. Marine Tel. Co. 46 Me. 483; compare Wilby v. Portsmouth, 35 N. H. 303; Barton v. Montpelier, 30 Vt. 650; Stewart v. Milford, 21 Wis. 485.

[20] Lade v. Shepard, 2 Str. 1004; U. S. v. Harris, 1 Sumn. (U. S.) 24; Maynell v. Surtees, 31 Eng. Law & Eq. 485; Bingham v. Doane, 9 Ham. (Ohio), 165; Coake v. Greene, 11 Price, 736; Chatham v. Brainard, 11 Conn. 60; Perley v. Chandler, 6 Mass. 454; Chamberlain v. Enfield, 43 N. H. 356; Jackson v. Hathaway, 15 Johns. (N. Y.) 447; Goodtitle v. Alker, 1 Bur. 133.

[21] Bell v. Wilson, 1 Law R. (Eq. Cas.) 303.

[22] Partridge v. Scott, 3 M. & W. 220; Farrand v. Marshall, 21 Barb. 409; Smith v. Hardesty, 31 Mo. 411; Walters v. Pfiel, Moody & M. 1, 362; Richart v. Scott, 7 Watts (Penn.), 460; Dodd v. Holme, 1 Ad. & E. 493; Hamer v. Knowles, 6 H. & N. 454.

[23] Wakefield v. Duke of Buccleugh, 4 L. R. (Eq. Cas.), 613; Humphries v. Brogden, 15 Jur. 124; 1 E. L. & Eq. 241; Backhouse v. Bonomi, 9 H. L. Cas. 503; Caledonian R. R. Co. v. Sprot, 2 Macq. (Scotch) 449.

[24] Hainer v. Knowles, 6 H. & N. 459; Smart v. Morton, 30 Eng. Law & Eq. 385; Hunt v. Peake, Johns. Ch. (Eng.) 705; Brown v. Robbins, 4 H. & N. 186; the degree of support must accord with the use of the property; Proud v. Bates, 34 L. J. (Ch.) 406; Berkley v. Shafte, 15 C. B. (N. S.) 79; Dugdale v. Robertson, 3 K. & J. 695; and a custom will not excuse, Constable v. Nicholson, 14 C. B. (N. S.) 230.

[25] Fletcher v. Ryland, 1 L. R. (Exch.) 263; Bagnall v. L. & N. W. R. R. Co., 7 H. & N. 421; Elliott v. N. W. R. R. Co., 10 H. L. Cas. 333; Radcliffe's Exors. v. Brooklyn, 4 N. Y. 195; Popplewell v. Hodgkinson, L. R. 4 Exchq. 248; Marvin v. Brewster Iron Co., 55 N. Y. 538.

[26] 1 Mitchell v. Mayor of Rome, 49 Ga. 19; Thurston v. Hancock, 12 Mass. 220; Hay v. Cohoes Co., 2 N. Y. 159; Tremain v. Cohoes Co., 2 N. Y. 164; Stroynan v. Knowles, 6 H. & N. 454; Hamer v. Knowles, 6 H. & N. 459; Richardson v. Vermont C. R. R. Co., 25 Vt. 465; Foley v. Wyeth, 2 Allen (Mass.) 131; Farrand v. Marshall, 19 Barb. 380; LaSala v. Holbrook, 4 Paiges Ch. (N. Y.) 169; Shrieve v. Stokes, 8 B. Mon. (Ky.), 453; McGuire v. McGuire, 1 Dutch. (N. J.) 356; Panton v. Holland, 17 Johns. 92; Trower v. Chadwick, 6 Bing. (N. C.) 1; Rockwood v. Wilson, 11 Cush. 221; Pickard v. Collins, 23 Barb. 444; Smith v. Kenrick, 7 C. B. 515; Gaylord v. Nichols, 9 Exch. 702; Massey v. Gadyer, 4 C. & P. 161; Charles v. Rankin, 22 Mo. 566; Farrand v. Marshall, 21 Barb. 409; Moody v. McClelland, 39 Ala. 45; Callender v. Marsh, 1 Pick. 164; Napier v. Bulwinkle, 5 Rich. (S. C.) 311; Solomon v. Vinters Co., 4 H. & N. 585; Smith v. Thackerah, L. R. (1 C. B.) 564; N. E. R. R. Co. v. Elliott, 1 Johns. & H. 146; Rawbotham v. Wilson, 8 E. & B. 123.

[27] Ludlow v. H. R. R. Co., 6 Lans. (N. Y.) 128; Webb v. Bird, 13 C. B. (N. S.) 840; Chasemore v. Richards. 5 H. & N. 992.

[28] Corby v. Hill, 4 C. B. (N. S.) 556; Hodman v. West Midland R. R. Co., 32 L. J. 2 B. 240; Gibbs v. Mersey Docks, 27 L. J. Exchq. 321; Lancaster Coal Co. v. Parnasby, 11 Ad. & E. 223; Indemaur v. Dames, L. R. 1 C. P. 274; Jarvis v. Dean, 11 Moore, 854; Barnes v. Ward, 9 C. B. 420; Blythe v. Topham, Cro. Jac. 158; Stone v. Jackson, 16 C. B. 199; Gandset v. Edgerton, L. R. 2 C. P. 371; Gallagher v. Humphrey, 10 W. R. 664.

the owner will not be liable[29] unless the person is a young child.[30]

XIII. *Privies.*—Every person who constructs a privy, cess-pool or drain upon his own premises, is bound to keep the filth collected there from becoming a nuisance to his neighbors,[31] but where the tenant is bound to keep drains in repair, the landlord will not be liable.[32]

Detroit, Mich. T. D. HAWLEY.

[29] Balch v. Smith, 7 H. & N. 736.

[30] K. C. R. v. Fitzsimmons, 22 Kan. 686; Powers v. Harlow, 53 Mich. 507; Birge v. Gardiner, 19 Conn. 507; R. R. Co. v. Stout, 17 Wall. 659; Keefe v. M. & St. P. R. R. 21 Minn. 207; Lynch v. Nurdin, 1 Q. B. 36.

[31] Rex v. Pedley, 1 Ad. & El. 822; Ball v. Nye, 99 Mass. 582; Tenant v. Golding, 1 Salk. 360; Draper v. Sheering, 4 L. T. (N. S.) 365; Marshall v. Cohen, 44 Ga, 489; Cook v. Montague, 26 L. T. (N. S.) 471; Cox v. Burbridge, 32 L. 112; Smith v. Humbert, 2 Kerr (N. B.), 602; Walter v. Selfe, 4 Eng. Law & Eq. 20; Ballamy v. Comb, 17 F. C. (Scotch), 159; Norris v. Barnes, L. R. 7 Q. B. 537; Hart v. Taylor, 4 Mur. (Scotch) 313; Wormersley v. Church, 17 L. T. (N. S.) 190; Mackey v. Greenhill, 30 Jur. 746; Draper v. Sheering, 4 L. T. (N. S.) 365; Gordon v. Vestry, 13 L. T. (N. S.) 511; Guardians v. Bowles, 20 L. T. (N. S.) 609.

[32] Brown v. Sargent, 1 Fost. & F. 112; Lord Egrement v. Pulman, M. & M. 404; McSwiney v. Hayes, 4 Jr. Eq. R. 322.

MUNICIPAL CORPORATIONS—POWER TO ACCEPT PRIVATE TRUSTS—CHARITABLE USES—PRIVATE CEMETERY.

HOLIFIELD v. ROBINSON.

Supreme Court of Alabama, December Term, 1885.

1. COUNTY.—*No Authority to take Bequest in Perpetuity for Private Purposes.*—Neither the county as a corporation, nor the court of county commissioners, has power to take a bequest in perpetuity, in trust to lend or invest it; and to appropriate the annual interest to the repair and preservation of the private burial ground of the testatrix and her family.

Bill in equity to enforce trust.

Appeal from Chambers Chancery Court.

Tried before Hon. S. K. McSpadden.

Geo. P. Harrison, Jr., counsel for appellants; *Dowdell v. Deusin, contra.*

The facts appear in the opinion of the court.

SOMERVILLE, J., delivered the opinion of the court:

Whether we regard this bill as one filed by the County of Chambers, or by complainants as members of the court of county commissioners of that county, it is, in either aspect, entirely wanting in equity. Its purpose is to enforce a trust created by the last will and testament of Mrs. Mary F. McLemore. This trust arises under the eleventh item of the will, in which the testatrix gives and bequeaths "to the commissioners of roads and revenues of the County of Chambers and State of Alabama, and their successors in office, or to such authority as may control and direct the finances of said County of Chambers," the sum of one thousand dollars, "to be held in perpetuity in trust." It is directed that the legal interest arising from this sum "be expended annually in the repair, preservation and safe keeping" of the burial grounds and monuments of the testatrix, and of certain deceased members of her family, which are located in the County of Chambers.

It is argued that this clause of the will creates a perpetuity, and is a bequest not in its nature charitable, and that it is for this reason void. The point is one in reference to which the authorities are not agreed, and its consideration is unnecessary for the decision of this case. We, therefore, pretermit it. 2 Perry on Trusts (3. ed.), § 706, and cases there cited.

We are quite clear in the view that the complainants are legally incapable of accepting this trust, even though it be construed to be a charitable devise. If they do so at all, it must necessarily be in their official and corporate capacity, for in no other way can they claim to have perpetuity of existence, or succession, and they are not personally named in the will. The duties imposed by the trust are most obviously repugnant to and inconsistent with the well defined purposes for which the public corporations, known in this State as counties, were created and organized. Counties are corporate political sub-divisions of the State, designed as agencies in the administration of civil government, and more particularly intended to aid in promoting the paramount object of all government, which is to afford security to the preservation of the life, liberty, and property of the citizen. The Court of County Commissioners, or as they were designated prior to the Code of 1852, "the Commissioners of Revenue and Roads," are officers of the county, and their chief function is to control the property and finances of the county, and to exercise a general superintendence over the public roads in the county. Code, 1876, §§ 756; 1619. The only duty of a purely charitable nature, which is devolved on them, is that of making rules and regulations for the support of the poor. This is a part of their police power, and is specially delegated by statute. Code, 1876, § 746, sub-div. 5. Counties, therefore, can accept no trusts, even of a charitable nature, in which they have no interest, unless it has some connection with the maintenance or benefit of the poor, either in relieving their physical wants and suffering, or in promoting their moral, religious, or secular education, or otherwise extending to them the hand of charity. If the trust is foreign to these purposes, and in no wise germane to the objects for which such public corporations are known to be instituted, but is designed merely for the private benefit of a particular person or class of persons, who are not indigent and in natural life, neither the county, nor the Court of County Commissioners, have the power in law to hold or execute it. As to them it is a matter entirely *ultra vires*. Angell & Ames on Corp. (3rd ed.), §§ 43-44; 2 Dill. Munic. Corp. §§ 567, 573; Clark v. Foot, 8 Johns. 329; Vidal v. Gi-

rard's Extrs. 2 How. (U. S.) 127, 189; Jones v. Habersham, 107 U. S. 174.

The trust here imposed is the management of a fund purely for a private benefit—the lending of money at interest, collecting such interest from year to year, and appropriating it for the repair and preservation of private burial grounds. It needs no argument to show that this is entirely beyond the scope of the duties imposed upon these commissioners or public officers. Neither the county in its corporate capacity, nor any succeeding body of commissioners, can be held responsible for any waste or mal-administration of the fund by the complainants. It is against the policy of the law to allow them to burden the country, or their successors in office with such a duty. They are paid for their official services a *per diem* allowance out of the country treasury. It is proper that their time and deliberations should during the sessions of the court, be devoted to the business of the public, and not to that of private persons, however worthy its nature. If any such burden is assumed, so in like manner another may be. The result might finally be, that, in the course of a few generations, the chief time of these county officials would be monopolized in discharging duties which might more appropriately be devolved upon the sexton of a churchyard or of a city cemetery.

The chancellor erred in granting the relief prayed in the bill. His decree is reversed, and a decree will be rendered in this court dismissing the bill, at the costs of the appellees in this court and the court below.

NOTE ON THE SUBJECT OF MUNICIPAL CORPORATIONS AS TRUSTEES.—As the decisions on this point are by no means numerous the principal case seems likely to be of value. The general rule, as laid down by Perry, is as follows: "It must be understood, however, that corporations are the creatures of the law; and that as a general rule they cannot exercise powers not given to them by their charters or acts of incorporation. For this reason they cannot act as trustees in a matter in which they have no interest, or in a matter that is inconsistent with, or repugnant to the purposes for which they were were created. Nor can they act as trustees if they are forbidden to take and hold lands, as by the statutes of mortmain, nor if they are not empowered to take the property:"[1] Or, as stated by Dillon; "Municipal corporations cannot, for the same reasons applicable to ordinary corporations aggregate, hold lands in trust for any object or matter foreign to the purpose for which they are created, and in which they have no interest."[2] In the celebrated case of Vidal v. Girard's Exrs.,[3] Judge Story said: It is true that if the trust be repugnant to, or inconsistent with, the proper purposes for which the corporationwas created, that may furnish a ground why it may not be compellable to execute it. But that will furnish no ground to declare the trust itself void, if otherwise unexceptionable; but it will simply require a new trustee to be substituted by the proper court, possessing equity jurisdiction, to enforce and perfect the objects of the trust." This ruling was followed in the case of Bell County v. Alexander,[4] adding the proposition that if the purposes of the trust are germane to the objects of the incorporation; if they relate to matters which will promote, aid, and perfect those objects; there can be no legal inpediment to the corportion taking the devise upon trust. So in McDonogh v. Murdock,[5] (after an interesting review of the civil law and the jurisprudence of continental Europe on the subject of devises in trust to corporations), it was decided that among the powers either expressly or impliedly granted to a city is that of establishing public school for gratuitous education, and therefore it may take a devise in trust for that purpose. Another case holds that a municipal corporation may take a devise in trust to purchase land and erect thereon a hospital for the indigent blind and lame, and to manage and regulate the institution; for such objects fall within the scope of its corporate duties.[6] Again, a devise of land to a town, directing "all the interest thereof to be laid out in repairing highways and bridges yearly, and not to be expended for any other use," is for a public and charitable use and valid.[7]

And it is held that a town may lawfully take a legacy upon a trust to devote the income to the assistance of poor persons (not paupers), by furnishing them fuel at low prices.[8] A legacy to the authorities of a city, in trust, as a perpetual fund, the income to be expended in planting and renewing shade trees, "especially in situations now exposing my fellow-citizens to the heat of the sun," is good, and the corporation may take.[9] And it has been held that a municipal corporation might receive by bequest and hold in trust a sum of money the income of which was to be devoted yearly to the purchase and use for display of United States flags.[10] But, on the other hand, the supervisors or other authorities of one county cannot take a devise in trust for the inhabitants of another county or town, or for any purposes extraneous to those of the county which they represent.[11] In the case of a devise to two townships in trust to apply the annual income to the education of their "poor orphan children," and the balance, if any, to go the indigent widows residing in the townships, it was held that the township corporations could not act as trustees of the fund, but the court would appoint a proper trustee.[12] By analogy, a corporation chartered to maintain an institution of learning, cannot take and hold funds in trust to pay over the income for the support of missionaries.[13] In the case of Reed v. Bank of Newburgh.[14] Chancellor Walworth suggested an important qualification to the general rule, in the following language: "It is a general rule that corporations cannot exercise any powers not given to them by their charters or acts of incorporation; and for that reason they cannot act as trustees in relation to any matters in which the corporation has no interest. But, whenever property is devised or granted to a corporation, partly for its own

1 1 Perry on Trusts, § 43.
2 2 Dillon Munic. Corp. § 443; 2 Kent's Com. 280; Kyd on Corp. 72; Trustees v. Peaslee, 15 N. H. 317; Chambers v. St. Louis, 29 Mo. 543; *Ex parte* Greenville Academy, 7 Rich. Eq. 471.
2 How. 126, 188.
4 22 Tex. 350.
5 15 How. 367.
6 Philadelphia v. Elliott, 3 Rawle (Pa.), 170.
7 Hamden v. Rice, 24 Conn. 350.
8 Webb v. Neal, 5 Allen, 575.
9 Cresson's Appeal, 30 Pa. St. 437.
10 Sargent v. Cornish, 54 N. H. 18.
11 Jackson v. Hartwell, 8 Johns. 422.
12 Mason v. Trustees, 27 N. J. Eq. 53.
13 Trustees v. Peaslee, 15 N. H. 317.
14 1 Paige Ch. 216.

use and partly for the use of others, the power of the corporation to take and hold the property for its own use carries with it, as a necessary incident, the power to execute that part of the trust which relates to others." H. CAMPBELL BLACK.

WEEKLY DIGEST OF RECENT CASES.

1. AGENCY—*Principal and Agent—Proof—Authority—Superintendent of Corporation—Evidence—Title—Telephone Company—Voucher—Tender—Refusal—Liability—Contract—Performance—Modification—Payment*—A proposition to show agency, though not sufficiently explicit, if not objected to on that ground, is admissible in evidence. The better practice is, however, first to require proof of the agency; and where some evidence of it has been given, it is competent to give the acts and declarations of the alleged agent, respecting the subject-matter of his authority, though such fact of agency cannot be proved by declarations or acts done without the knowledge or authority of his principal. The scope of an agent's authority cannot be determined from the fact of his being superintendent of a company; and if proof of the manner in which, in specific instances, he was held out to the world is admitted, so should proof be received of his particular instructions from the company. Nor can the object and design of a private corporation be determined from its title. A telephone company received poles on a contract with a person who had sub-contracted with another to deliver them. A voucher was made by the company in the name of the third party and delivered to the original contractor, who tendered it to said third party in discharge of his own debt. The tender was refused, and the voucher handed back to the company. *Held*, that there was no liability on the company until the voucher had been accepted, and after refusal of tender, suit cannot be brought against the company. Any appearance that the parties have mutually dispensed with full performance of a contract, or have modified the terms will prevent a defense that payment was only to be made when the contract had been filled, and that it had not been so completed or fully performed. *Central, etc. Co. v. Thompson*, S. C. Penn., March 1, 1886. Atl. Rep. III, 439.

2. APPEAL—*Presumption from Record—Measure of Damages.*—The rule established by the later decisions of this court is, that the presumption of injury from error is repelled when, on the whole record, the court can see clearly and satisfactorily that no injury resulted from the error. Therefore, on appeal by the plaintiff below, in an action against a railroad company for damages on account of personal injuries, the plaintiff having recovered a judgment on verdict, and the rule as to the measure of damages having been correctly stated to the jury, other charges given as to the legal liability of the defendant, under the facts in evidence, if erroneous, are not ground of reversal. *Donovan v. South, etc. R. R. Co.*, S. C. Ala., December term, 1885, Montgomery Despatch, May 13, 1886.

3. CHATTEL MORTGAGE—*Description of Property.—Costs—Appeal—Judgment—Erroneous as to One Appellant*—A chattel mortgage covering "fifty head of steers about (20) months old, now owned by me, and in my possession on my farm in Independence township, Jasper county, Iowa," sufficiently describes the property to enable an honest inquirer to identify it, and the fact of part of the farm being in another township is not material. Where a judgment is affirmed as to one of two appellants, but is erroneous and must be modified as to the other, such other may recover his costs in this court, and they should be taxed half to the appellee, and half to the other appellant. *Kenyon v. Framel*, S. C. Iowa, April 23, 1886, N. W. Rep. V. 28, p. 37.

4. ———. *Description, When Sufficient—Locus of Property—Pleading—Petition—Sufficient Averment*—A description of personal property mortgaged, which describes the property enough to lead to its identification, is sufficient. "In Hardin county" sufficiently describes the *locus* of the property. If a petition has an exhibit attached to it, all facts stated in exhibit are a part of the petition. *Wells v. Wilcox*, S. C. Iowa, April 23, 1886, N. W. Rep. Vol. 28, p. 29.

5. COMMON CARRIER—*Commutation—Discrimination.*—1. A railroad company chartered as a carrier of passengers and freight is under no obligation to establish commutation rates for a particular locality; but when it has established such rates and commutation tickets are sold thereat to the public, the refusal of such a ticket to a particular individual, under the same circumstances and upon the same conditions as such tickets are sold to the rest of the public, is an unjust discrimination against him and a violation of the principle of equality which the company is bound to observe in the conduct of its business. 2. The relator was the holder of a monthly commutation ticket. On one occasion during the month for which ticket was issued, he left it at home by inadvertence and when on the train, being asked for his ticket and not finding it, he tendered the conductor a regular trip ticket provided it should not be punched and should be returned to him the next morning on presentation of his commutation ticket, and refused otherwise to pay his fare. This request the conductor refused for the reason that he had no right to permit the relator to ride on a ticket which should not be punched, and the relator remained on the train without paying fare or surrendering the trip ticket and without any disturbance being made. *Held*, (1) that the relator by such conduct made himself liable to be ejected from the train, and it may be to the forfeiture of the commutation ticket he then held, but that such misconduct did not justify the company in refusing to sell the relator commutation tickets thereafter: and (2)

that for such wrongful refusal the relator may have remedy by mandamus. *State, ex rel v. Delaware, etc. Co.*, S. C. New Jersey, February 26, 1886, Cent. Rep. V. 2, p. 726.

6. CONTRACT — *Partnership — Damages*—1. In an action for breach of a contract to take plaintiff into partnership in business, plaintiff cannot prove his damages by means of the opinions of himself and others as to what the yearly profits of the business would have amounted. 2. In such case all the facts are to be placed before the court and the jury permitted to draw inferences and make up judgments from them. *Reed v. McConnell*, N. Y. Ct. of App,, Jan. 19, 1886, Cent. Rep. V. 2, p. 747.

7. CORPORATION—*Benevolent Associations — Mutual Benefit Society—Person "Incapable of Working."*—A man recovering from an illness of about three weeks' duration may justly be deemed to be "incapable of working," within the meaning of a by-law of a mutual benefit association giving to persons so disabled a certain benefit, although, by unreasonable, excessive, and harmful effort and exertion, he succeeds in doing light work for two consecutive days, and then by reason thereof suffers a relapse, and the fact that he received wages for those two days is immaterial. *Genest v. L'-Union St. Joseph*, S. C. Mass. March 31, 1886, N. E. Repr. V. 6, p. 380.

8. ——. *Liability of for its Officers.*—A railroad corporation is liable for all acts of wantonness, rudeness or force done or caused by its agents or servants in or about the duties or business assigned to them, though in violation of the general rules or orders prescribed for their conduct; and the rule as to vindictive damages for such acts, in actions against the corporation, is the same as in actions against natural persons. *Louisville, etc. R. R. Co. v. Whitman*, S. C. Ala., December term, 1885, Montgomery (Ala.) Despatch, May 13, 1886.

9. CORPORATION, MUNICIPAL—*Action against City for Personal Injuries Resulting from a Defective Sidewalk.—Pleading Sufficiency of Allegation as to Existence of Incorporation of City—Municipal Corporation Appearing, and making Affirmative Defence, admits its Existence—Opinion of Witnesses as to Condition of a Side-Walk Inadmissible—Instruction as to Notice of Defect on part of City.*—1. An allegation in a petition stating that defendant is a corporation created and organized under the provisions of art. 5 of Chap. 89 Rev. Stat. of Mo. 1879, is sufficient, without pleading the preliminary steps by which the city became organized under that statute the statute pleaded relates to cities of the fourth class. Bliss Code Pl. § 260. 2. Where a public municipal corporation appears, and makes an affirmative defence, based on the fact that it is a corporation, and where the mayor and other officers testify as to their respective official capacities, and where a pamphlet is put in evidence purporting to be the ordinances of the city—all this without objection—such corporation admits its existence and the above proof is ample to establish this fact, as well as that it was a city of the fourth class. 55 Mo. 416; 64 Mo. 625. 3. In an action for damages against a city for personal injuries resulting from a defective sidewalk, it is error to ask witnesses to state if they know of their own knowledge, whether or not the sidewalk was in a reasonably safe condition for the traveling public. In such case the inquiry must be confined to facts showing, or tending to show the condition of the sidewalk. The jury must determine the reasonableness of its condition. 49 Mo. 274. An instruction where there is evidence to support it, to the effect that if the evidence does not show that the city had actual knowledge of such defect, or that the defect existed for such a length of time before the injury, that the city if exercising proper care and diligence would have known of it, then the verdict should be for the city, fairly presents the question of notice of defect on the part of the city. *Eubank v. City of Edina*, S. C. Mo. May 17, 1886.

10. —— ——. *Streets—Extention over Railroad Tracks—Right of Railroad Company to Use of Street—Decision of City Council—Appeal-Assessment of Damages—Offsetting Supposed Benefits to Railroad Company — Constructive Notice by Publication.*—Under a city charter conferring a general power to lay out and extend streets, an authority to extend the same across the roadway of a railway corporation will, as a general rule, be implied. The appropriation of land occupied as such roadway for a street crossing, in such cases, is necessarily subject to the prior public use of the railway corporation, but is not ordinarily inconsistent with it. The action of the city council in determining the necessity and propriety of extending streets in such cases, if regular, is not subject to judicial revision except upon appeal. In the assessment of damages for such street crossing it is error to offset supposed benefits to the railway company for the opening of such street across such roadway. But where a remedy is afforded by appeal for the correction of erroneous assessments, the proceedings are not void for such cause. In proceeding *in rem* for the condemnation of land, and the assessment of the owners' damages therefor, it is competent for the legislature to provide for constructive notice of the proceedings to the parties interested by publication. *St. Paul etc. Co. v. Minneapolis*, S. C. Minn. April 7, 1886, N. W. Rep. 500.

11. ——. ——. *Township—Subscription of Stock of Railroad Companies—Special Tax—Repeal of Statute—Mandamus.*— On the thirteenth April, 1869, under a statute of March 23, 1868, the people of the township of Cape Girardeau, Cape Girardeau county, Missouri, voted a subscription to the capital stock of the Cape Girardeau & State Line Railroad Company. The first section of the act prescribed the condition upon which such elections could be ordered by the county court, and required coupon bonds to be issued in payment of any subscription voted. By the second section the court has power, in order to pay any subscription voted, or the interest and principal of any bond issued on account of it, to levy a special tax on all the real estate lying within the township. On the tenth of March, 1871, the said second section was amended, so as to require the tax to be levied also on all personal property, including the statements of merchants doing business within the township. *Held*, that such subsequent enactment was not a law impairing the obligation of a contract, within the meaning of the constitutional prohibition. *Held, further*, that as the act of March 10, 1871, had not been expressly repealed, and was not repugnant to any act of the Revision of 1879, at the time the relator filed his information, it continued in full force and effect; and that the relator was entitled to proceed by *mandamus* against the county court to compel the levy of a tax upon all the real estate

and personal property and merchants' licenses, in order to the satisfaction of his judgment against the county for the amount of certain past-due coupons of bonds which had been issued by the county for the payment of the subscription so made by the township. *Cape Girardeau v. United States*, S. C. U. S. April 19, 1886, S. C. Rep. V. 6. p. 951.

12. ——— ———. One doing business along a street in a populous city has a right to obstruct the sidewalk temporarily for the necessities of his business if exercised in a reasonable manner and so as not to unnecessarily obstruct and incumber it, and he is under no obligation to furnish pedestrians a safe passage around the obstruction. *Welsh v. Wilson*, N. Y. Ct. of Appeals, January 19, 1886, Cent. Rep. V. Rep. V. 2 p. 749.

13. ——— ———. *Icy Sidewalk—Contributory Negligence—Notice to Policeman—Charge of Court.*—Whether a person is negligent in venturing upon a sidewalk which is in an icy condition when all danger could be avoided by going upon the opposite walk which is clear and safe, is for the jury. The trial judge, after pointing out in his main charge that notice to charge the city might be either actual or constructive, at defendant's request charged: "That the fact that officer Pitcairn observed the snow and ice on the twelfth, thirteenth, fifteenth, seventeenth, eighteenth, nineteenth and twentieth of January, and made the entry in the book as he testified he did, and the further facts that he reported the fact as he had testified; such facts are not in themselves sufficient to charge the city with notice." *Held* error. *Twogood v. Meyer etc. New York*, N. Y. Ct. of Appeals, April 13, 1886. East. Rep. IV. 726.

14. CRIMINAL LAW.—*Impeaching Witness who Testifies in His Own Behalf—To Disregard Testimony it must have been Knowingly False—Evidence must Furnish Basis for Instructions—Quantum of Force in Self-Defense—All Necessary Instructions Should be Given.*—1. When a criminal becomes a witness in his own behalf, the State is justified in introducing evidence attacking his general moral character. In such case he is subject to the same rules and tests, and can be impeached the same as any other witness. 67 Mo. 380. 2. An instruction which omits any word or expression, requiring that the testimony of a witness in order to be disregarded, should have been knowingly or wilfully false, is improperly given. 62 Mo. 701; 63 Id. 59; 64 Id. 552. 3. There must be a sufficient basis in the evidence for any instruction on the point in hand, even though the instruction be correctly worded. Id. 4. Where a defendant acts in a moment of apparently impending peril, it is improper to assume that he should nicely gauge the proper *quantum* of force necessary to repel the force of the deceased. 79 Mo. 544; 69 Mo. 469. 5. It is the duty of the trial court to give all necessary instructions, whether asked or not. *State v. Palmer*, S. C. Mo., May 17, 1886.

15. ——— ———. *Once in Jeopardy—Cross-Examination of Defendant—Seduction—Former Specific Acts—Subsequent Promise.*—1. Where a verdict is set aside and a new trial granted on defendant's own motion, he may be put upon trial upon the same facts, before charged against him, and the proceedings had will constitute no protection. 78 Mo. 600; Cooley's Const. Lim., pp. 327-328. 2. It is error to permit the State to cross-examine a defendant as to matters not testified to by him in chief. § 1918 R. S.; 75 Mo. 171-573; 76 Mo. 351-354; 81 Mo. 231. 3. In a criminal prosecution for seduction under promise of marriage, the defendant may show prior specific acts of unchastity by the prosecutrix with other men than defendant. Overruling State v. Brassfield, 81 Mo. 151. 4. It is error to permit evidence to be admitted on the part of the State of a promise of marriage by the defendant seventeen months after the seduction. *State v. Patterson*, S. C. Mo., Jan. 26, 1886.

16. ——— ———. *New Trial—Remarks by Court.*—The defendant was arraigned upon an indictment for a statutory felony, whereupon his counsel presented a motion for a continuance of said cause, and in support thereof presented and read the affidavit of the prisoner, in which he swore that he could not safely proceed to trial at the then present term of the court for the want of certain material witnesses, among the rest, Calvin Bowman, the father of the prisoner. Whereupon the court or judge thereof upon the bench, in the presence of certain of the regular panel of petit jurymen, some of whom afterwards sat in the trial of the cause, said, stated, and declared that said affidavit was false; that defendant's father had told him he would have nothing to do with the defendant; that defendant had committed perjury; and that a grand jury would be called to investigate the same. *Held*, error, and a new trial awarded. *Bowman v. State*, S. C. Neb., April 21, 1886, N. W. Rep., vol. 28, p. 1.

17. ——— ———. *Municipal Ordinance — Effect of Repeal.*—A municipal ordinance prohibiting the sale of spirituous liquors under a penalty, and a subsequent ordinance prohibiting their sale without a license, the price of which is prescribed, being inconsistent and repugnant, the former is repealed by the latter. When a municipal ordinance is repealed pending an appeal from a conviction in a prosecution for a violation of its provisions, the prosecution falls with it, unless the repealing ordinance excepts pending prosecutions from its operations, the general statute (Code, § 4449) applying only to laws, and not to municipal ordinances. *Barton v. Gadsden*, S. C. Ala., December Term, 1885, Montgomery Dis., May 13, 1886.

18. EVIDENCE.—*Experts—Fire Insurance—Agents.*—Before one can testify as an expert he must establish his capacity as such. The mere fact of one's being an insurance agent does not render him competent to testify as an expert on the nature of risks. A clause in a fire insurance policy required the insured to disclose his ownership in the premises insured, were it not absolute, and that such facts should appear in the policy. The insured offered evidence to prove that the insurance agent had taken proof as a notary public six months before the insurance was granted, and knew from this proof that the insured held under a sheriff's certificate of execution sale. *Held*, that because the agent knew these facts as a notary six months before the insurance was granted, it did not follow that he was possessed of such information as agent of the defendant when the insurance was given. *Stennett v. Pennsylvania, etc. Co.*, S. C. Iowa, April 23, 1886, N. W. Rep., vol. 28, p. 12.

19. ———. *Parol—Collateral Agreement—Mechanics' Liens—Enforcement.*—Defendant signed a contract for the purchase of lightning-rods at a price stipulated in the contract. He was induced to sign

this upon the representation that it was to be used as an advertisement only, having made a parol agreement for the purchase on very different terms from those recited in the contract. *Held*, that parol evidence was not admissible to vary a contract in writing. It is necessary in foreclosing a mechanic's lien to prove that the buildings are situated on the lands described. *Hutton v. Maines*, S. C. Iowa, April 22, 1886, N. W. Rep., vol. 28, p. 9.

20. EXECUTORS AND ADMINISTRATORS—*Agreement Between Heirs for Distribution—Validity—Will—Probate of Will—Lack of Diligence*—When there are no creditors of an estate, and the heirs are able and willing to, and in fact do, collect the assets and distribute them satisfactorily among themselves, such distribution having been made and executed, it will be binding in both law and equity upon the heirs participating in the arrangement. After 14 years have elapsed since the death of the testator, the will being notoriously in existence and accessible throughout that time, it is too late for one of the heirs, who had agreed at the time of the death to another scheme of distribution, to prove the will, and claim benefits under it inconsistent with his former agreement, and adverse to the interest of the representatives of a fellow-heir, who has died since the distribution under the agreement. *Foote v. Foote*, S. C. Mich. April 29, 1886, N. W. Rep. Vol. 28, p. 90.

21. INSURANCE—*Fire Insurance—Town Insurance Company—Assignments of Claim for loss Caused by Negligence of Railroad Company*—A town insurance company, organized under Laws 1872, c. 103, that has been compelled to pay a loss caused by a fire started through the negligence of a railroad company, may take an assignment of the whole claim for damages from the insured exceeding the amount paid by it, and recover the full amount thereof from the railroad company. *Hustisford, etc. Co. v. Chicago, etc. Co.*, S. C. Wis., April 6, 1886, N. W. Rep. V. 28, p. 64.

22. JUDGMENT—*Satisfaction—Attorney*—The attorney for the defendant paid a certain judgment, agreeing with the plaintiff's attorney that, if the defendant refused to reimburse him, the payment was to be refunded, and the satisfaction of the judgment returned. The plaintiff supposed that his judgment had been satisfied, and knew nothing as to where the money to pay it had come from. The defendant's attorney took no assignment of the judgment to protect himself. *Held*, that under these circumstances the judgment must be considered satisfied. *Rogers v. Welte*, S. C. Mich. April 29, 1886, N. W. Rep. V. 28, p. 86.

23. ———. *Default—Complaint for Relief—Excusable Neglect*—A complaint for relief from a judgment taken against a party through his excusable neglect, showing that he has a meritorious defense which could have been made to the action, and clearly stating the facts showing excusable neglect in allowing judgment to be taken against him, is good on demurrer. *Clandy v. Caldwell*, S. C. Ind., April 20, 1886, N. E. Rep., V. 6, p. 360.

24. MORTGAGE—*Chattel Mortgage—Rights of Mortgagee—Injunction*—A mortgagee of personal property has an interest therein, for the protection of which he may appeal to a court of equity, and an injunction may be granted him, although the mortgage debt is not yet due, where he makes a proper showing therefor. *McCormick v. Hartley*, S. C. Ind., April 20, 1886, N. E. Rep., V. 6, p. 357.

25. ———. *Warranty Deed—Evidence*—Where a conveyance is in fee, with a covenant of warranty, and there is no defeasance, either in the conveyance or in a collateral paper, parol evidence to show that it was intended to secure a debt, and to operate only as a mortgage, must be clear, unequivocal, and convincing, or the presumption that the instrument is what it purports to be must prevail. *Cadman v. Peter*, S. C. U. S. April 26, 1886, S. C. Rep., V. 6, p. 957.

26. NEGLIGENCE—*Fellow-Servants*—It is the duty of a person employed to operate a machine to see that it and everything about it are safe. One who omits this precaution, especially after being directed by his foreman to make examination, is guilty of contributory negligence. Fellow-servants are those engaged in a common employment whether in the same place or not. Nor does it matter, if one is injured by the defective work of his co-employees, that he was absent at the time it was performed. *Reading Iron Works v. Devine*, S. C. Penn., Pitts. Leg. Jour. May 19, 1886.

27. PARTNERSHIP—*Participation in Profits Does not Constitute—Contract Construed*—1. A mere participation in profits and loss does not necessarily constitute a partnership between the parties so participating, but it is a question of intention, and each case must be determined by its own particular facts. 68 Mo. 242; 67 Mo. 173; 76 Mo. 658; 82 Mo. 76; 82 Mo. 358. 2. An agreement to the following effect, does not constitute a partnership: that the party of the first part this day turns over to the party of the second part the "Post-Observer" newspaper to be by the party of the second part conducted in every respect as if he were the owner thereof; further, the party of the second part to conduct the business in his own name, to pay all expenses of same, and to pay one-half the net proceeds to the party of the first part, the party of the first part reserving the right to direct the general and political policy of the paper, and also at any time to dispose of one-half interest in the same. In case of such sale the said party of the first part agrees to lease to the party of the second part the remaining half at the rate of $150 per annum. *Kellogg v. Ferrall*, S. C. Mo., May 17, 1886.

28. ———. *Accounting.*—In the statement of a partnership account, which involves items of debit or credit against or in favor of one or both of the partners, it is erroneous to state the account in debtor and creditor form as between the partners individually; but the account of each partner with the partnership should be first stated, and then the account between the partners individually on the basis of that result, one-half of the indebtedness of either to the firm being the amount of his indebtedness to the other; and individual debts, paid by one for the other, should be charged in the individual account. *Garrett v. Robinson*, S. C. Ala., December term, 1885, Montgomery (Ala.) Despatch, May 13, 1886.

29. ———. *Proof of, Question for Jury—Individual Debts*—Where two persons agree to engage in the prosecution of a lawful continuing business, each to furnish a portion of the capital stock, and to share in the profits and losses thereof, they are partners in such business; and where the terms of the agreement are not disputed, it is proper for the court to construe it, and not to submit the

question of partnership or no partnership to the jury. A bill of sale of partnership property, given by one of the partners to pay an individual debt, does not affect the right of the other partner thereto, unless he sanctions the sale. *Kingsbury v. Thorp*, S. C. Mich., April 29, 1886, N. W. Rep. V. 28, p. 74.

30. PRACTICE.—*Continuance—Surprise — Evidence —New Trial — Surprise — Motion—Principal and Surety—Bonds—Parties to*—Defendants asked for a continuance because they were surprised by matters contained in an amended reply. The plaintiff made affidavit that he had informed the defendant of the nature of his amended reply, and had been assured that no continuance would be granted. *Held*, that such evidence was inadmissible, as the agreement of defendants' counsel was not in writing, as required by statute. Counsel cannot be charged with knowledge of a defense until the same has been pleaded, and a motion for new trial on account of surprise will not be defeated by proving such prior knowledge. Where one is surety on a bond for costs he is entitled to sue the principal when he has delivered a draft, signed by himself, and the bond is discharged. *Sapp v. Aiken*, S. C. Iowa, April 23, 1886. N. Rep. V. 28, p. 24.

31. PRINCIPAL AND SURETY.—*Action against Sureties on Sheriffs' Bond—Sheriff Substituted in Trust Deed or Defaults, Sureties are not liable.*—Where parties provide by a certain deed of trust, that, in event the trustee named therein refused to act, that the then Sheriff of the County execute the trust, and where the trustee refused to act, and the Sheriff is accordingly substituted as trustee, and sells the land and fails to pay over a portion of the proceeds, his sureties in his official bond are not liable for such misconduct. *State, ex rel, Chase v. Davis*. S. C. Mo., May 17, 1886.

32. REMOVAL OF CAUSES.—*Colorable Assignment—Jurisdiction—Dismissal—Removal.*—The courts of the United States have power, under the act of March 3, 1875, to dismiss or remand a case, if it appears that a colorable assignment has been made of a claim for the purpose of imposing on their jurisdiction; but they have no authority to take jurisdiction of a case, by removal from a state court, when a colorable assignment has been made to prevent such a removal. *Oakley v. Goodnow*, S. C. U. S. April 19, 1886; S. C. Rep. V. 6 p. 944.

33. ——— ———. — *Jurisdiction — Citizenship* —Upon a petition filed for the removal of a suit from a State court to the circuit court of the United States, under § 5 of the act of March 3, 1875, (18 St. 470, *c.* 137,) the circuit court cannot take jurisdiction of the cause if all the parties on one side of the suit are not citizens of different States from those on the other. If there are necessary parties on one side of the suit citizens of the same State with those on the other, the circuit court cannot take jurisdiction. In such a case an order of the circuit court remanding the cause to the State court will be affirmed. *Cambria etc. Co. v. Ashburn*, S. C. U. S. April 19, 1886. S. C. Rep. V. 6 p. 929.

34. SET-OFF AND COUNTER-CLAIM — *Claims in Different Rights*—The plaintiff's husband owed the defendant some money. He gave the defendant an order on a firm for $400. The plaintiff claimed that the money on which this order was drawn was her own, and that the $400 was delivered as a loan and not in payment of her husband's debt. It was *held* no error to charge the jury "that it was immaterial to defendant whether as between the plaintiff and her husband she had a valid title to it," (the money on which the order was given.) *Hoyt v. Hoyt*, S. C. Iowa, April 23, 1886. N. W. Rep. V. 28 p. 27.

35. STATUTE—*Code—Medical Association — Penalty —Prohibition.*—By the act adopting the code of 1876, which was approved February 2d, 1877, it was provided, that "no act of the General Assembly passed at the present session shall be repealed or otherwise affected by" its adoption; and by force of this provision, an act passed subsequent to the adoption of the Code, and therein incorporated by the codifiers, repeals by implication any other provisions relating to the same subject with which it is in irreconcilable conflict. Under the provisions of the act to regulate the practice of medicine in this State, approved February 9, 1877, (Code, §§ 1528-35), the board of censors of the State Medical Association, and the boards of censors of several affiliated county associations, alone have authority to determine the qualifications required of persons desiring to practice medicine, and to grant certificates of qualification; and any person who engages in the practice of medicine, without having procured a certificate of qualification (§4244), is declared guilty of a misdemeanor. A penalty imposed by statute implies a prohibition; consequently, a recovery cannot be had for medical services rendered by a person who has not procured a certificate of qualification from the proper medical authorities of the county in which he practices. *Harrison v. Jones*, S. C. Ala. December Term 1885. Montgomery (Ala.) Despatch, May 13, 1886.

36. TRUSTS AND TRUSTEE. — *Trustee Delegating Authority—Sale thereunder Void—Equity will not Relieve Against Mere Mistake of Law.*—1. A trustee in a deed of trust cannot delegate the trust or power of sale to a third person, unless expressly authorized to do so by the deed, and a sale made by such delegated agent is void. 72 Mo. 503; 50 Mo. 22; 63 Mo. 51. 2. The sale in this case having been made by the agent of the trustee, to whom authority to sell was thus delegated, and there being no express provision in the trust deed authorizing it, is void, and the deed based on such sale is likewise void. 3. Equity will not afford relief against a mere mistake of law. 1 Story Eq., §§ 111-115; 50 Mo. 315; 1 Peter, 1-15. 4. The mistake of the present case is one of law, and relief will be denied. *City of St. Louis v. Priest*, S. C. Mo., May 17, 1886.

37. WILL.—*Construction—Devise.*—Testator's will, after usual provisions for payment of debts and a provisional holding of the estate for one year, provided: "After the allowance of one-third of my property to the widow," that his estate shall go to "all my children * * * * share and share alike." *Held*, that these words must be construed as an absolute bequest and devise in fee to the widow of one-third of all the property, real and personal. *White v. Commonwealth*, S. C. Pa., Pitts. Leg. Jour., May 19, 1886.

QUERIES AND ANSWERS.*

[*Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.*]

QUERIES.

47. A. makes a note to B., reading: "Three years after date, for value, I promise to pay, etc., with eight per cent. interest per annum." Is the interest on above note due at the end of each year, so B. may sue for same, or must he wait till the three years are up? Please cite authorities. G. & F.

QUERIES ANSWERED.

Query No. 15. [22 Cent. L. J. 119.]—LIEN OF MORTGAGE UPON PROCEEDS OF HOMESTEAD—A. and B. are judgment creditors of C. C.'s entire property consists of a homestead, set apart and recorded under the provisions of the Louisiana Constitution of 1879, and legislation thereunder. Upon an obligation, contracted by C. after recording his homestead, A. obtains his judgment and has it recorded in the mortgage office of the parish where C.'s homestead is situated. Subsequently, upon an obligation contracted by C. before recording his homestead, B. obtains his judgment and has it recorded in the same mortgage office. The recordation of C.'s homestead is a bar to the execution of A.'s judgment; but not to B.'s. Therefore B. seizes the homestead, and has it sold. Can A. legally claim the proceeds by virtue of his prior judicial mortgage? W. U. R.

Answer.—The right of C. to homestead will not extend to proceeds remaining after sale under B.'s judgment. A. will be entitled to have remaining proceeds applied to his judgment. Casebolt v. Donaldson, 67 Mo. 308. U. X.

CORRESPONDENCE.

INTER-STATE GARNISHMENT.

To the Editor of the Central Law Journal:

As bearing on the question lately discussed in your columns touching the remedy of a debtor in one State to prevent his creditor bringing suit in another State and garnishing his earnings there so as to cut off his exemptions, the Supreme Court of Iowa has just decided in Taeger v. Laudsley, 27 N. W. Rep. 739, that where the debtor and creditor both live in this State and the creditor brings action, or causes it to be brought, in another State, for the purpose of garnishing an indebtedness due to defendant in this State (*e. g.*, by a railway company whose line extends through both States), and exempt here, the defendant may have the plaintiff enjoined from prosecuting such action in the foreign State, and if the latter nevertheless persists in prosecuting the action and recovering the money in the foreign State, the amount thus secured by him in violation of the injunction may be recovered back in this State. The court cites and follows the case of Snook v. Snetzer, 25 Ohio St. 516. E. McC.

Iowa City, Iowa, May 17, 1886.

RECENT PUBLICATIONS.

REPORTS OF CASES DECIDED IN THE COURT OF CHANCERY.—The Prerogative Court, and on Appeal, in the Court of Errors and Appeals of the State of New Jersey. John H. Stewart, Reporter, Vol. XIII. (of the Whole Series of Equity Reports, Vol. XL.) Trenton, N. J. The W. S. Sharp Printing Co. 1886.

This volume is the very latest of the well known series of New Jersey Equity Reports, the character and authority of which are too well established to need any commendation from us. The arrangement of the matter and the typographical execution of the volume leave nothing to be desired.

THE STUDENT'S KENT.—An Abridgment of Kent's Commentaries on American Law, By Eben Francis Thompson. With an Introduction by Hon. T. L. Nelson, Judge of the United States District Court. Boston and New York, Houghton, Mifflin and Company. (The Riverside Press, Cambridge), 1886.

The little book now before us is a very valuable abridgement of the great standard work on American Law. The object of the work is set forth in the preface, with a terseness very appropriate in an abridgement: "The writer has aimed to abridge and to retain all that is most valuable to the student, omitting only that which is less essential. In many instances the exact language of Judge Kent has been retained, but in some cases a more concise style has been adopted." The work has evidently been prepared with great care, and the compiler has manifestly succeeded in his effort to present succinctly to the legal neophyte all the leading principles of law contained in the original work but shorn of propositions of minor importance and those which are merely cumulative. The work is appropriately denominated: "The Student's Kent" as it is an excellent introduction to the study of the law. Of course a single volume of 300 pages, could not include all the matter of value embraced in the four volumes of Kent's commentaries, but Mr. Thompson has so carefully exercised his judgment in selecting, and his skill in condensing the substance of the commentaries, that there are in them few points, even of minor importance which are not briefly reproduced in the abridgment. The use and value of this abridgment is in affording to the student a general and comprehensive view of the labors which lie before him. He can only expect to learn from it the broader principles of the science, the details of which will form the subject of the *viginti annorum lucubrationes*, which according to ancient authority are necessary to the mastery of the Common Law of England. For this purpose, and as a preliminary to the solid work of acquiring an adequate knowledge of his profession, this book may very safely be commended.

THE JUSTICE OF THE PEACE.—A Compendium of the Law Relating to Justices of the Peace—Their Powers and Duties—The Proceedings in Justices' Courts, With Forms of Process and Entries used therein. By William L. Murfree, Sen., Author of "Sheriffs," "Official Bonds," etc. St. Louis: The F. H. Thomas Law Book Company, 1886.

It cannot be said of this book, as Macauley said of Doctor Nares' Life of Lord Burleigh, that it should be weighed according to its avoirdupois. Mr. Murfree might have followed the prevailing example and produced three instead of one volume from the material it contains. The subject is a highly important one, and in view of the large amount of litigation, especially in cities, which is daily brought before justice courts, it is a matter of some wonder that no previous at-

tempt has been made to give a more comprehensive, full and systematic exposition of the law upon this subject than is found in the few works which do not profess to be of more than local value. Such works are necessarily incomplete and unsatisfactory, even when they do not attempt to cover, as some of them do, the field of general jurisprudence. Peculiar difficulties surround the administration of the law in these statutory tribunals, which arise in a large measure from questions of jurisdiction. In this book that heading has been given especial prominence. The author has taken up the several divisions and sub-divisions of both civil and criminal practice before justices, and upon each has given in a condensed form the law, not of one State, but of many, and the reader is thus given a clearer view of the law of his own State, and the means of supplying omissions. The statutory provisions governing justice practice present the same general features in nearly all the States, and there is a great mass of decisions which, when collected and systematically arranged, must prove of material assistance to the courts and the practitioner. And, however difficult it may be for men untrained in technical rules, as most justices are, to learn from books the legal limitations of their powers, and the proper manner of performing their duties, yet those who are willing to be informed will find an excellent guide in Mr. Murfree; moreover there is furnished here the most complete set of forms we remember to have seen in any work of the kind.

Some very interesting questions have arisen touching the effect to be given to entries in a justices docket. The court is not one of record and therefore the entries are not matters of record importing absolute verity, yet in some of the States they cannot be impeached collaterally, even upon jurisdictional points. (§§345-351). Perhaps the most consistent rule is that which obtains in Ohio (§ 354) and in California (Jolly v. Foltz, 34 Cal. 321), where it is held that the record entry of a justice is evidence only in respect of those matters which the justice is required by the statute to enter in his docket, and that as to these, the record entry is the only and unimpeachable evidence for collateral purposes. B.

JETSAM AND FLOTSAM.

LIEN OF ATTORNEYS.—Maggie C. sued her cousin, John C., in the city court for damages for assault and battery. When the case came up for trial she wished to withdraw it, but her lawyer insisted that he had a lien upon the cause of action, and that unless he was paid it must be prosecuted. Chief Justice McAdam, to whom Maggie appealed, held that a cause of action for personal injuries not being assignable, a lien could not attach to it until it was made certain by a verdict. "The parties to a merely personal difficulty," he said, "should be allowed to settle their differences, even without the concurrence of their attorneys. The language of the Holy Writ, 'Blessed are the peacemakers, etc.,' accords with the maxim, '*Interest republicæ ut sit finis litium*,' and every principle of law, order and propriety agree that the peace of the family now prevailing should not be broken up by the dark visage of intestine war, waged, not for principle, but 'for costs.' The plaintiff will, therefore, be allowed to discontinue her action without costs."—*Exch.*

MR. COURTNEY KENNY has introduced a bill, in the English House of Commons, with the object of freeing laymen from liability to prosecutions for the expression of opinion on religious matters. Its provisions are rather curious. The preamble declares the expediency of repealing certain laws, which were intended for the promotion of religion, but are no longer suitable for the purpose. What the bill then proceeds to enact is that no criminal proceedings shall be instituted for schism, heresy, apostacy, blasphemous libel, blasphemy at common law, or atheism. This provision, however, is not intended to affect proceedings in the Ecclesiastical courts against clergymen of the established churches. Of the enactments expressly repealed, the first is a statute of King Edward VI, "against such as shall unreverently speak against the sacrament of the body and blood of Christ, commonly called the sacrament of the altar." One part of this statute, which the bill repeals, directs that the sacrament shall be administered to the people both in bread and in wine. Another enactment repealed is that portion of the Act of Uniformity of the first year of Queen Elizabeth which imposes penalties on those who "in any interludes, plays, songs, rhymes, or by other open words declare or speak anything in the derogation, depraving, or despising of the same book (of Common Prayer), or of anything therein contained, or any part thereof." Another statute repealed by the bill is one of King William III. for the more effectual suppressing of blasphemy and profaneness. This enactment directs punishment for any one who, having been educated in or having made profession of the Christian religion, shall by writing, printing, teaching, or advised speaking deny any one of the persons in the Holy Trinity to be God, or shall assert or maintain that there are more gods than one, or shall deny the Christian religion to be true or the Holy Scriptures to be of divine authority. However, the Act of King George II. against profane cursing and swearing is not to be affected, nor any other enactment that is not expressly repealed.—*Exch.*

THE following poetical marriage notice was inclosed to us, by a correspondent, in a newspaper slip, with the request that we re-publish it. We comply with pleasure, and trust that we do not presume in adding our congratulations. And "here's hoping" that our friend's friend and his fair bride may "live long and prosper."

In Paola, Kas., May 13, 1886, John C. Sheridan, prosecuting attorney of Miami county, and Miss Callie Long, daughter of ex-Sheriff Long, all of Paola.

From musty tomes of legal lore,
From pleadings, briefs and conflicts sore,
From wordy fights at many a bar,
From client's tales of neighbor's jars,
Friend John has turned for peace and rest,
To that great blessing of the blest!
A loving wife!

May actions wise their joys conserve,
Each writ and process duly serve,
To make the record more complete;
May pleadings, judgments and decrees,
Demurrers, evidence and fees,
Bring to them naught but pleasure sweet,
Throughout long life.